United States Court of Appeals

for the Second Circuit

APPENDIX

NO. 77-7228

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORIGINAL

Docket No. 77-7228

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CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants

--against--

GENERAL MOTORS CORPORATION and
E.I. DU PONT DE NEMOURS & COMPANY,
Defendants-Appellees.

P/S

UNITED STATES COURT OF APPEALS
FILED
OCT 17 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPELLANTS' APPENDIX

NETTER DOWD NESS ALFIERI & STERN
660 Madison Avenue
New York, N.Y. 10021
Attorneys for Plaintiffs-Appellants

PAGINATION AS IN ORIGINAL COPY

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(PERTINENT TO THIS APPEAL)

UNITED STATES DISTRICT COURT

Civil Docket 121-251

RITA GOTTESMAN AND MARIA MATTIELLO

ARLYNE ZUCKER & PAUL J. PEYSER

vs.

GENERAL MOTORS CORPORATION AND E. I. DU PONT

DE NEMOURS AND COMPANY

DOCKET ENTRIES - EXTRACT (PERTINENT TO THIS APPEAL)

Mar. 9-72	Filed Memorandum in support of application of Clendon H. Lee for award of counsel fees.
Aug. 8-73	Filed Deft. E. I. duPont deNemours & Co. Response by Deft. duPont to Lee application for award of counsel fees.
Aug. 8-73	Filed Opposition of Deft. General Motors Corp. to application of Clendon H. Lee for payment of counsel fees.
Jan. 5-76	Filed notice of appearance and notice of claim of Clendon H. Lee.
Jan. 26-76	Filed order dismissing action with prejudice and without costs; final judgment to be entered. Plaintiffs may apply at the foot of this judgment within 90 days of the date hereof, for an award of counsel fees, disbursements and expenses as referred to in the notice of hearing of the application for this order. - Metzner, J. JUDGMENT ENTERED - 1-27-76 -- Clerk m/n
Apr. 22-76	Filed pltfs. affvdt. and notice of motion for an order to be included at the foot of the judgment dated 1-23-76 granting pltfs. application for payment by defts. ret date to be fis by the court.
June 2-76	Filed Opposition of deft. duPont to pltfs' application for attorneys fees.
June 2-76	Filed opposition of General Motors Corp. to application for attorneys fees and expenses.
Nov. 24-76	Filed reply affdvt. of Richard Netter on behalf of pltf.

Apr. 13-77 Filed Opinion #45782 & Order. Counsel for pltffs seek an award of $1,000,000 as counsel fees & $345,059.94 for disbursements & expenses. The claim is directed against both General Motors on whose behalf the antitrust suit was prosecuted, & E. I. duPont, the prime deft. The court has rec'vd. neither a proper affdvt of services nor an itemization of the am't requested as disbursements. While the court has extensive knowledge of the litigation, this knowledge only goes to the nature & extent of the legal services rendered, not to the am't & propriety of the claimed disbursements. However, this omission does not affect the determination of the application, which must be denied. For the reasons stated, the motion is denied. So Ordered, METZNER, J. n/m

May 5-77 Filed pltffs notice of appeal to the USCA from every part of the order by Judge Metzner, ent. 4-13-77, denying the application by attys for an award of counsel fees, disbursements & expenses, etc.
Copies sent to:
William A. Grier, Esq., Edward B. Wallace, Esq. Attys for deft General Motors Corp.
767 Fifth Avenue New York,N.Y. 10022
&
Covington & Burling
Attys for deft E.I.duPont deNemours & Co.
888 Sixteenth St.,N.W.
Washington, D.C. 20006

July 12-77 Filed letter to Judge Metzner dtd 1-22-76 by Clendon H. Lee re counsel fees.

July 12-77 Filed letter to Judge Metzner, dtd 9-20-73, by Clendon H. Lee.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs,

-against-

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY,

Defendants.

Civil Action

No. 121-251

- x

MEMORANDUM IN SUPPORT OF APPLICATION OF CLENDON H. LEE FOR AWARD OF COUNSEL FEES

INTRODUCTION

The facts as to legal services are described in the affidavit of CLENDON H. LEE, the "Applicant" herein, sworn to March 7, 1972. The affidavit incorporates as Exhibit B thereto a detailed description of legal services, being more than a hundred pages of copies of records made

in the ordinary course of business for a ten-year period. Likewise the affidavit incorporates papers filed in this and other courts with which this Court is familiar. Moreover, the Court has knowledge of applicant's personal appearances before it as well as papers filed or transmitted to the Court. Accordingly no purpose would be served by repeating here the facts of applicant's services, and reference is respectfully made to the affidavit of March 7, 1972 for a factual description.

ARGUMENT

GENERAL MOTORS CORPORATION IS LIABLE AS A MATTER OF LAW FOR THE VALUE OF APPLICANT'S SERVICES TO IT.

The Supreme Court's opinion in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), laid to rest any possible doubt as to General Motors' liability for legal services rendered to it in this derivative action on its behalf.

At the outset it is important and controlling to note that Mr. Justice Harlan's opinion for the Court squarely held that where a federal "statutory policy" was vindica-

ted, "petitioners have rendered a substantial service to the corporation and its shareholders". (396 U.S. at 396)

There is no specific grant in the antitrust laws of any right to shareholders to bring a derivative action. In this case (268 F.2d 194), as in Rogers v. American Can Co., (3 Cir. 1962) 305 F.2d 297, the right has been implied. In the Rogers case there is a comprehensive analysis of the implied right of shareholders to bring an antitrust action, as well as reference to the Second Circuit's opinion (268 F.2d 194) with respect to the derivative action herein.

In J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964), the Court held that although there was no express reference to a private right of action under § 14(a) of the Securities Exchange Act of 1934 "...we believe that a right of action exists as to both derivative and direct causes". (Emphasis added)

The Court, in justifying the implication of a private right of action, stated at 432:

> "As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most

effective weapon in the enforcement of the proxy requirements."

Thus, the Court raised the securities laws to the dignity of the antitrust laws for purposes of encouraging, through corporate therapeutics, private litigation to vindicate the statutory policy of such Acts of Congress.

The Court's own estimate of the level of dignity of the antitrust laws was stated in Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958), where it declared (p.4):

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."

Since the "vindication" of the policy of the securities laws (following the analogy of the antitrust laws), with nothing more, compels the award of counsel fees in a derivative action, only some novel demotion of the antitrust laws to a lower estate than "charter of economic liberty" could justify failure to award counsel fees in a de-

rivative antitrust action which has established the cause of action.

In Mills the Court emphatically made clear that "...the determination of what constitutes a cause of action..." made "appropriate" the award of counsel fees at that time (396 U.S. at 390 n.13, emphasis added).*

In 414 F.2d 956 the Court squarely made in this case the "...determination of what constitutes a cause of action..." in holding that this Court

> "...erred in deciding that a violation of Section 7 of the Clayton Act cannot support a private cause of action for money damages, and that [it] improperly restricted the scope and weight of the government's judgment in the first du Pont case as applied to the case at bar." (414 F.2d at 958-59)

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* Mr. Justice Harlan's numerous citations included (396 U.S. at 395, n.22) Abrams v. Textile Realty Corp., 197 Misc. 25, 97 NYS 2d. 492 where Referee Tuttle stated: "The law cannot refuse to recognize as beneficial full observance of the law". (97 NYS 2d, at 496)

When the reviewing Court, noting the continued violation, referred (414 F.2d at 964) to "... a real present danger of impairment of competition" it described the same quality of statutory standard as Mr. Justice Harlan's determination of "...a significant propensity to affect the voting process...". (396 U.S. at 384)

Thus, it was determined and established that the violation of Section 7 continued into and during the damage period. The violation did not stop "as of 1949" (414 F.2d at 965). Rather the "crux of the violation existed on June 3, 1957 ... and continued to exist until after the Court decreed complete divestiture by du Pont in 1961" (414 F.2d at 964).

The establishment of the cause of action was again recognized on the second appeal where the Court stated (436 F.2d at 1211, n.21):

> "...On the present appeal the plaintiffs have taken the position that in view of du Pont's established and admitted violation of Section 7 of the Clayton Act it is no longer necessary on the issue of

liability to consider the alleged Sher-
man Act violations. (Emphasis added)

This Court on remand had earlier noted, "Du Pont conceded that its stock interest in General Motors constituted a violation of § 7 during the damage period." (310 F.Supp. 1258, emphasis added)

Thus, the present right to recover counsel fees which clearly existed upon the decision of the first appeal was reemphasized both on remand and on the second appeal.

Whether General Motors which has struggled against establishing the cause of action elects to pursue remedies or reimbursement from du Pont does not affect applicant's rights against General Motors, nor is applicant required to pass over the primary liability of General Motors in whose favor the cause of action was established.

The thrust of the Mills decision cannot be diverted from the corporation whose interests have been served in establishing the cause of action.

In Mills it was not contemplated that the merged corporation or its shareholders would necessarily receive

any relief whatever, the Court "impl[ying] nothing about the form of relief to which they may be entitled." (396 U.S. at 386, emphasis added) The Court discussed possible equitable or monetary relief in cautionary terms (396 U.S. at 386-89) and specifically held "In short, damages should be recoverable only to the extent they can be shown." (396 U.S. at 389, emphasis added)

The Court also left to lower courts in the first instance, and after the "issue of relief has been litigated," the question of future and additional attorneys fees, declining to rule upon a further award for future services "regardless of whether petitioners are ultimately successful in obtaining significant relief." (396 U.S. at 396, n.13)

Later the Court said (396 U.S. at 396-97):

> "Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this

sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." (Footnote omitted, emphasis added)

A further decision (January 10, 1972) in the Mills case has now denied equitable relief altogether, and the Court's fifth "Conclusion of Law" held:

"5. If it can be shown that plaintiffs suffered an injury by reason of the merger, they may be adequately compensated by money damages." Mills v. Electric Auto-Lite Co. (N.D.Ill., E.D. No. 63 C 1138, January 10, 1972, CCH Fed. Securities L.

Reptr., Para. 93,354)

Therefore, after counsel fees had been awarded, equitable relief has been denied and any monetary relief whatever is still conjectural.

The Mills case, therefore, after the decision of January 10, 1972 is in precisely the same posture as was this case following the first appeal reported at 414 F.2d 956, and applicant's fee must be paid as a matter of law.

CONCLUSION

Applicant's affidavit of March 7, 1972 sets forth the basis for determining the reasonable value of applicant's individual services in accordance with applicable legal standards and canon; on the grounds set forth therein and for the foregoing reasons General Motors Corporation in the first instance should be directed to pay over to applicant not less than $500,000. over a period of time corresponding to the length of time during which such services were rendered as the reasonable value thereof.

Respectfully submitted,

March 1972

Clendon H. Lee
Applicant
90 Park Avenue
New York, N.Y. 10016
Tel: 687-2120

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs, - against - GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	Civil Action No. 121-251(CMM)

RESPONSE BY DEFENDANT DU PONT TO LEE APPLICATION FOR AWARD OF COUNSEL FEES

The Lee application rests on the proposition that General Motors is liable, as a matter of law, to pay him counsel fees (Mem. p. 2). For reasons that are set forth in General Motors' response and will not be restated here, that is not a correct statement of the law. There is no basis in the authority cited (Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)), or elsewhere, for charging General Motors for the services performed by the applicant in dragging the company through extended litigation without resulting benefit, monetary or otherwise.

The application also appears to request, at least in the alternative, that Du Pont be directed to pay the fees for which Lee has applied (Affidavit p. 10) and the supporting memorandum suggests that if General Motors were to pay him

(3)

14a

"in the first instance" it might have a right to "reimbursement from du Pont" (Mem. pp. 10 and 17). The purpose of this response is to point out that this branch of the application is also without merit.

Nowhere does the application cite or even hint at any legal basis upon which Du Pont could be required, either primarily or derivatively, to pay the fees to which Lee asserts entitlement. Lee has never claimed to act on behalf of Du Pont, and has always been its adversary. None of the matters in which he was engaged ever held any potential for benefitting Du Pont. Mills v. Electric Auto-Lite Co., supra, which is incorrectly urged in support of the claim made against General Motors, is plainly inapplicable. It provides no basis for saddling Du Pont, a successful defendant, with the attorneys' fees of unsuccessful plaintiffs. As the Supreme Court's recent decision in Hall v. Cole, 41 U.S.L.W. 4658 (May 21, 1973), emphasizes, Mills speaks only to the award of fees of counsel in "successful litigation," and even then only in cases where the governing statute, unlike Section 4 of the Clayton Act which is applicable here, does not fully detail available remedies.

Had plaintiffs succeeded in establishing that General Motors had suffered injury in its business or property by reason of a Du Pont violation of the antitrust laws, the judgment against Du Pont would have included a

reasonable attorneys' fee, as is specifically provided in Section 4 of the Clayton Act, 15 U.S.C.A. § 15. In such circumstances it would have been appropriate for the Court to consider the Lee application as well as similar applications from court-appointed general counsel and other counsel for the plaintiffs from whom Lee says he was able to "obtain assistance," although only "with utmost difficulty" (Affidavit p. 7). But as the Court and the applicant well know, such are not the circumstances in which the Lee application is presented. Having failed to establish that General Motors was injured and entitled to recovery under Section 4 of the Clayton Act, plaintiffs have failed to meet the statutory requirements for recovery of attorneys' fees from Du Pont. There is no basis on which Du Pont could be held liable, primarily or derivatively, for payment of such fees.

For these reasons, and the reasons stated in the Opposition of General Motors to Lee's Application, that application should be denied.

Respectfully submitted,

COVINGTON & BURLING

By Daniel M Gribbon
(A Member Of The Firm)

888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Defendant E. I. du Pont de Nemours & Company

Of Counsel:

Daniel M. Gribbon
Harris Weinstein

August 17, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs,	:	Civil Action No. 121-251(CMM)
- against -	:	
GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	:	

CERTIFICATE OF SERVICE

I certify that the foregoing Response By Defendant Du Pont To Lee Application For Award Of Counsel Fees was served upon the Applicant Lee, plaintiffs, and defendant General Motors Corporation by mailing copies of the same, first class mail, postage prepaid, to each of the following:

David Brady, Esq.
Bergreen & Bergreen
660 Madison Avenue
New York, New York 10021

Netter Lewy Dowd Fox Ness & Stream
660 Madison Avenue
New York, New York 10021

Henry L. Bayles, Esq.
55 Liberty Street
New York, New York 10005

Attorneys For Plaintiffs

Ross L. Malone, Esq.
General Motors Corporation
Legal Department
767 Fifth Avenue
New York, New York 10022

Attorney For Defendant General Motors Corporation

Clendon H. Lee, Esq.
Rogers Hoge & Hills
90 Park Avenue
New York, New York 10016

Harris Weinstein

Attorney For Defendant E. I. du Pont de Nemours & Company

August 17, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER, Plaintiffs, -against- GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	:	Civil Action No. 121-251 (C.M

OPPOSITION OF DEFENDANT, GENERAL MOTORS CORPORATION, TO APPLICATION OF CLENDON H. LEE FOR PAYMENT OF COUNSEL FEES

This unprecedented application has been made by Clendon H. Lee, one of the many attorneys who has appeared for plaintiffs in this action over the last sixteen years. He seeks an order directing General Motors Corporation to pay him "not less than $500,000" in counsel fees for his participation in plaintiffs' unsuccessful effort to establish on behalf of General Motors a derivative right to recover from Du Pont treble damages

under Section 4 of the Clayton Act*, 15 U.S.C. § 15, or single damages on the basis of common law fiduciary rules on the theory that Du Pont's ownership of General Motors stock injured General Motors in its purchases of automotive fabrics and finishes.

The applicant is neither General Counsel appointed by order of this Court, nor the Chief Trial Counsel who represented the plaintiffs at the trial, which resulted in the dismissal of the complaint, or in the various appeals affirming the judgment entered in this Court in favor of the defendants. He was not one of the attorneys who instituted the lawsuit.

General Motors has no knowledge of the difficulties Mr. Lee says that he encountered in obtaining assistance from all associates with the exception of Mr. Brady. It should be noted, however, that Mr. Bayles is the attorney who currently appears to be in charge of representing plaintiffs. In applying for an extension of time within which to respond to the defendants' pending

*/ We note that any fee that would be awarded under Section 4 would be part of the judgment against the alleged wrongdoer in the action, in this case Du Pont, and would not, in any event, be payable by General Motors, the alleged injured party.

motions to dismiss the undetermined causes of action, Mr. Bayles explained that he alone had knowledge of the allegations of the complaint, and that Mr. Brady had turned over to him the drafting of plaintiffs' proposed memorandum in opposition.

The applicant's recital of his "professional activity and background" and the detailed description of his purported legal services are irrelevant, and General Motors will not respond to them at this time. This is for the obvious reason that plaintiffs were unsuccessful in asserting their claim and as a matter of law General Motors is not liable for the alleged value of applicant's services. Furthermore, nothing has been accomplished for the benefit of General Motors or its stockholders.

I. THE SUPREME COURT'S OPINION OF MAY 21, 1973 IN HALL, ETC., ET AL. v. COLE REQUIRES DENIAL OF THIS APPLICATION FOR ATTORNEYS' FEES

In Hall, etc., et al. v. Cole, 41 U.S.L.W. 4658 (U.S. May 21, 1973) the Supreme Court recently reviewed in extenso the circumstances under which federal courts may award attorneys fees when such fees are not

authorized by statute. In upholding an allowance of counsel fees to the successful plaintiff in a suit to regain his union membership, under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 412 which makes no provision for attorneys' fees, the Court discussed the two exceptions under which "federal courts, in the exercise of their equitable power may award attorneys' fees when the interests of justice require" (41 L.W. 4659). The Court stated at page 4659:

> "... it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons'" (emphasis added)

and went on to note:

> "[a]nother established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the Court's jurisdiction over the subject matter of the suit makes possible an award that will operate to apread the costs proportionately among them' Mills v. Electric Auto-Lite, 396 U.S. 375, 393-394" (emphasis added)

Neither of these two recognized exceptions are applicable to Mr. Lee's application for counsel fees.

Plaintiffs were not successful in the litigation and no benefit was conferred by the litigation on General Motors or its stockholders.

The applicant rests his case on a misinterpretation of the determination in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Mills was a derivative stockholders action for violation of Section 14 of the Securities Exchange Act arising out of a misstatement in a proxy statement concerning a proposed merger. The Supreme Court found that since the statement was defective there had been a violation and that the stockholders who had instituted the suit were entitled to monetary or equitable relief. The case was remanded for a determination of the nature of this relief.

The absence here of any determination that plaintiffs have a right to relief of any character precludes this application from coming within the exception discussed and applied in Hall and Mills.

Mr. Lee argues that General Motors received a benefit because of the determination of the Second Circuit that there could be a cause of action for damages arising out of a violation of Section 7 of the Clayton

Act. The Court in arriving at this conclusion expressly stated;

> "Of course, plaintiffs cannot rest on a showing of a violation of Section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation." Gottesman, et al. v. General Motors Corporation, et al., 414 F.2d 956 (2d Cir. 1969).

On the second appeal, which affirmed the judgment dismissing the complaint, the Court of Appeals underscored the fact that no injury to General Motors Corporation has been found. In referring to its prior decision, the Court stated in part, at pages 1209-10;

> " . . . But we were there referring to the injury to the public interest which resulted from du Pont's violation of Section 7 of the Clayton Act, not to private injury to General Motors. Private injury does not necessarily accompany such a public injury." Gottesman, et al. v. General Motors Corporation, et al., 426 F. 2d 1205 (2d Cir. 1971).

As pointed out above, in Mills the plaintiffs were successful in establishing liability in favor of the stockholders suing in behalf of Electric Auto-Lite Co. In Hall plaintiff vindicated his own right to free speech and reinstatement as a union member and "necessarily

rendered a substantial service to his union as an institution and to all of its members." In Gottesman, however, the mere establishment of an abstract question of law, that a complaint alleging a violation of Section 7 of the Clayton Act is sufficient to state a cause of action, did not result in a benefit to General Motors, as the complaint was dismissed. In Mills and Hall plaintiffs proved the causes of action pleaded and were successful in obtaining judicial relief. In Gottesman plaintiffs merely established the sufficiency of their pleading.

In Gottesman neither Mr. Lee nor any of his associates "established the violation" of Section 7 of the Clayton Act by Du Pont. It was the Government which established that Du Pont had violated Section 7 of the Clayton Act in the original Chicago case. Du Pont did not contest that the violation continued throughout the period at issue in Gottesman. As stated above, the Court of Appeals in Gottesman merely determined that there could be a cause of action for such a violation if, and only if, there is proof by the stockholders "that they had been injured by the violation" -- proof which in this case was not forthcoming.

II. SECTION 4 OF THE CLAYTON ACT AND COMMON LAW PRINCIPLES PRECLUDE AN AWARD OF ATTORNEYS' FEES

The applicant wholly ignores Section 4 of the Clayton Act, which governs the recovery of counsel fees in private antitrust damage actions such as this case. Thus quite apart from his failure to come within the factual requirements for an award of fees established in Mills, his reliance upon Mills is misplaced because that decision does not purport to determine the awardability of attorneys' fees where, as here, Congress has granted a statutory cause of action with express remedial provisions, including attorneys' fees.

The cause of action alleged and proved in Mills was founded upon a statute, Section 14(a) of the Securities Exchange Act, which did not specifically provide for a right of private recovery or for attorneys' fees. The Court thus approached the latter issue as a facet of its task, following its decision in J. I. Case Co. v. Borak, 377 U.S. 426 (1964), of formulating appropriate remedies for a judicially implied private cause of action for violation of Section 14(a). The Court expressly limited its

decision on the awardability of counsel fees to circumstances in which the right to such fees was not governed by statute but implied by judicial decision. See 396 U.S. at 391. For example, the Court distinguished Mills from its prior decision precluding the award of counsel fees in trademark actions under the Lanham Act in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), where the Court held that the exclusion of attorneys' fees from the remedies available under Section 35 of the Lanham Act, 15 U.S.C. § 1117 (1970), "mark[ed] the boundaries of the power to award monetary relief in cases arising under the Act." See 386 U.S. at 721.

That Fleischmann remains a viable precedent with regard to the power of Congress to circumscribe an allowance of attorneys fees where they would be appropriate as a matter of equity also was made abundantly clear by the Court in Hall v. Cole, supra. The Court in commenting upon the import of its decision in Fleischmann stated at page 4660:

> "[i]n reaching that result, we reasoned that, since Section 35 'meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed' Congress must have intended the express remedial provisions of Section 35' to mark the boundaries of the power to award monetary relief in cases arising under the Act.'"

The application for allowance of fees in this case is, therefore, controlled not by Mills but by the decisions in Hall and in Fleischmann where the Court said that when Congress has spoken with respect to the conditions under which it will allow attorneys' fees as a remedy for a statutory violation, a "judicially created compensatory remedy in addition to the express statutory remedies is inappropriate . . .." Id. at 721. In the enactment of Section 4 of the Clayton Act, Congress has spoken with respect to allowance of attorneys' fees in private treble damage actions under the antitrust law and resort to non-statutory considerations is, therefore, inappropriate.

Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

> of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis supplied.)

This statute thus explicitly allows an attorney's fee to be assessed but only as part of a judgment for treble damages. Such a judgment, in turn, may be entered only when the plaintiff proves both a violation of a pertinent antitrust statute by defendant and resulting injury to plaintiff's "business or property." Here there was no judgment for treble damages because of a complete failure of proof that General Motors was injured by Du Pont's ownership of stock.

This Court decided over twenty years ago that such a failure of proof also precludes an award of attorneys' fees under Section 4. Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948), directly holds that because "plaintiffs have not proved anything from which the court could approximate the damages" and were thus "not entitled to a money judgment," attorneys' fees could not be awarded. Id. at 899. This principle has been

followed by the federal courts generally, see, e.g., Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731 (9th Cir. 1959) (attorneys' fees not allowed for prosecution of antitrust counter-claim failing for lack of proof of injury and causation) and Richardson v. Chrysler Motors Corp., 257 F. Supp. 547, 556 (S.D. Tex. 1966) (attorneys' fees denied where neither liability or damages has been proved), and it was recently reaffirmed in this Court's opinions in City of Philadelphia v. Chas. Pfizer & Co., 345 F. Supp. 454 (S.D.N.Y. 1972); Vandervelde v. Put & Call Brokers & Dealers Assn., 344 F. Supp. 157 (S.D.N.Y. 1972); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482-83 (S.D.N.Y. 1970), reversed on other grounds, 449 F. 2d 51 (2d Cir. 1971), reversed, 409 U.S. 363 (1973).

Any contention that the applicant should be awarded fees for failing to establish that General Motors had common law claims against Du Pont would be wholly without merit. It is well established that fees may be awarded to counsel who sue derivatively to enforce such claims only where the corporation, on whose behalf the action is brought, has benefited either by a money judgment or otherwise as the result of counsel's efforts. See, e.g

Schnechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957); Bosch v. Meeker Cooperative Light and Power Assn., 257 Minn. 362, 101 N.W. 2d 423 (1960). Applicant asserts no benefits to General Motors as the result of his efforts to establish common law claims against Du Pont and there demonstrably have been none.

CONCLUSION

If plaintiffs had been successful in this action, counsel fees would have been an element of damages awarded under the antitrust laws or taken from a recovery based on common law fiduciary grounds. In spite of the clear and salutory limitation of counsel fees to successful plaintiffs in such actions, applicant would have this court award counsel fees to attorneys who participate in unsuccessful derivative actions for alleged violations of the antitrust laws or common law rules.

Such a result would be wholly contrary to well considered and established rules and the application accordingly should be denied.

Dated: New York, New York
August 17, 1973

Ross L. Malone

ROSS L. MALONE,
Attorney for Defendant
General Motors Corporati
767 Fifth Avenue
New York, New York 1002

Telephone: (212) 486-35(

Of Counsel

Edward B. Wallace
John J. Higgins

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs, -against- GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	Civil Acti No. 121-25

CERTIFICATE OF SERVICE

I certify that the foregoing Opposition Of Defendant, General Motors Corporation, To Application Of Clendon H. Lee For Payment Of Counsel Fees was served upo the Applicant Lee, plaintiffs, and defendant E. I. duPont de Nemours & Company, by mailing copies of the same, firs class mail, postage prepaid, to each of the following:

David Brady, Esq.
Bergreen & Bergreen
660 Madison Avenue
New York, New York 10021

Netter Lewy Dowd Fox Ness & Stream
660 Madison Avenue
New York, New York 10021

Henry L. Bayles, Esq.
55 Liberty Street
New York, New York 10005

Attorneys For Plaintiffs

Harris Weinstein, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for Defendant
E. I. du Pont de Nemours & Company

Clendon H. Lee, Esq.
Rogers Hoge & Hills
90 Park Avenue
New York, New York 10016

ROSS L. MALONE

By _____
John J. Higgins

Attorney for Defendant
General Motors Corporati

August 17, 1973

HENRY L. BAYLES
ATTORNEY AT LAW
55 LIBERTY STREET
NEW YORK, N. Y. 10005
WORTH 4 0285

August 31st, 1973

Hon. Charles M. Metzner
United States District Judge
Federal Courthouse
Foley Square
New York City, New York

Re: Gottesman v.
General Motors, et al

Dear Judge Metzner:

In connection with the individual application which Mr. Clendon H. Lee has seen fit to make for attorney's fees in the above action, I respectfully request permission until September 21,1973 for leave to submit papers setting forth the position of General Counsel in the Gottesman case with respect to Mr. Lee's application.

Respectfully yours,

Henry L. Bayles

HLB:fg

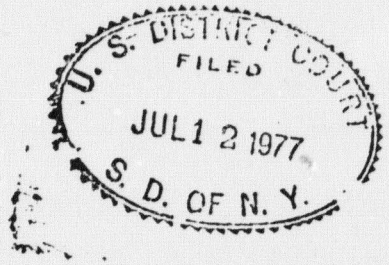
Cc: Clendon H. Lee, Esquire
Daniel M. Gribbon, Esquire
Edward H. Wallace, Esquire
Ross L. Malone, Esquire
Netter, Lewy, Doud, Fox, Hess & Stream, Esquires
David Brady, Esquire

(51) 35a

NINETY PARK AVENUE
NEW YORK 10016

September 20, 1973

By Hand



Hon. Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Gottesman v. General Motors, et al.
Civil Action No. 121-251

Dear Judge Metzner:

In view of the discussions which I now understand to be taking place among other interested persons, I respectfully request that my individual application for counsel fees to be paid by General Motors Corporation be withdrawn - without prejudice.

Respectfully yours,

Clendon H. Lee

Clendon H. Lee

CHL:HM

CC: Ross L. Malone, Esq.
David Brady, Esq.
Daniel M. Gribbon, Esq.
Netter, Netter, Dowd, Fox & Ness, Esqs.
Henry L. Bayles, Esq.

(6)

GENERAL MOTORS CORPORATION

General Motors Building · 767 Fifth Avenue, New York, New York 10022

Telephone
(212) 486-5000

November 18, 1975

Honorable Charles M. Metzner
United States District Judge
Federal Courthouse
Foley Square
New York, New York 10007

Re: Gottesman et al. v. General Motors Corporation and E. I. duPont de Nemours & Company, Civil Action No. 121-251; Schiff et al. v. General Motors Corporation and E. I. duPont de Nemours & Company, Civil Action No. 63 Civ. 533

Dear Judge Metzner:

Enclosed herewith, purely for information at this point in time, are two envelopes each containing the Notice of Hearing, etc. in the above cases, the Third Quarter 1975 Report of General Motors Corporation and the General Motors 1976 Product Line Booklet. Third class bulk rate mailing of this material to the Corporation's stockholders commenced on November 6, 1975 and, I am now advised, will be completed today November 18.

Proof of mailing in accordance with your order dated October 24, 1975 will be filed promptly following completion of the mailing.

Respectfully yours,

William A. Grier

William A. Grier
Attorney
Office of the General Counsel

WAG:ban
Enclosure

cc: Henry L. Bayles, Esq.
55 Liberty Street
New York, New York 10005

Netter Dowd Ness Alfieri & Stern
Attention: Richard Netter, Esq.
660 Madison Avenue
New York, New York 10021

David Brady, Esq.
660 Madison Avenue
New York, New York 10021

Daniel M. Gribbon, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Edward W. Schall, Esq.
Legal Staff
F. I. duPont de Nemours & Company
Wilmington, Delaware 19898

Edward B. Wallace, Esq.
Amend & Amend
40 Wall Street
New York, New York 10005

Notice of Hearing on Proposed Dismissal of Actions Asserting Claims on Behalf of General Motors Corporation

To All Holders of Common Stock of General Motors Corporation:

Pursuant to an Order dated October 24, 1975, of The Honorable Charles M. Metzner, Judge of the United States District Court for the Southern District of New York, notice is hereby given you that a hearing will be held on the 23rd day of January 1976, at 2:00 o'clock in the afternoon (E.S.T.) at Room 619 of the United States District Court for the Southern District of New York, Foley Square, New York, New York (and at any adjourned time or times as the Court may, without further notice, order) for the purpose of determining whether dismissal with prejudice of all the remaining claims in the consolidated action entitled *Gottesman* v. *General Motors Corporation and E. I. du Pont de Nemours & Company* (Civil Action No. 121-251) and of all claims in the action entitled *Schiff* v. *General Motors Corporation and E. I. du Pont de Nemours & Company* (Civil Action No. 63 Civ. 533) is fair, proper, and reasonable, and in the best interests of General Motors Corporation and its stockholders.

Description of Litigation

The derivative actions consolidated into the above-entitled *Gottesman* action were brought by certain General Motors' stockholders in 1957, shortly after the Supreme Court ruled in *United States* v. *E. I. du Pont de Nemours & Company*, 353 U.S. 586 (1957), that du Pont's ownership of General Motors stock violated Section 7 of the Clayton Act because it created the threat of adverse competitive effects in the sale of automotive fabrics and finishes. Thereafter the Supreme Court ordered du Pont to divest itself of any ownership of General Motors stock (366 U.S. 316) and du Pont completed such divestiture in March 1965.

The amended consolidated complaint in the *Gottesman* case charges that du Pont used its General Motors stock in violation of the antitrust laws and its common law fiduciary obligations, and to the injury of General Motors, in its sale of automotive fabrics and finishes, refrigerator finishes, and "Freon" refrigerants to General Motors; in transactions involving Kinetic Chemicals, Inc. (a manufacturer of "Freon" refrigerants owned jointly by du Pont and General Motors until the end of 1949); and in arrangements between du Pont and General Motors and Standard Oil Company (New Jersey), terminated in 1948, for the manufacture and sale of tetraethyl lead. The case is limited to transactions occuring on or after May 4, 1950, since none of the plaintiffs in the *Gottesman* action owned General Motors stock prior to that date.

1

The allegations in the *Schiff* case, also a derivative suit, filed March, 1963, are substantially the same as those of the amended consolidated complaint in *Gottesman* with the exception that the plaintiff asserts that the ownership of stock of General Motors is traceable to a period prior to 1936 and therefore claims the right to sue on behalf of General Motors for transactions occurring prior to 1950. Proceedings in the *Schiff* case have been stayed pending disposition of the *Gottesman* case.

Ever since the *Gottesman* case was instituted in the year 1957 and until the trial in 1966-1967, plaintiffs engaged in pretrial proceedings, including extensive discovery, inspection, protracted examinations, interrogatories and numerous motions. The discovery covered events taking place during the periods in issue in both cases. The trial took place before Hon. Charles M. Metzner of the United States District Court for the Southern District of New York. The trial consumed ten weeks. It was limited by Court order, pursuant to the parties' agreement, to automotive fabrics and finishes, the only products considered by the Supreme Court in its decisions.

In its decisions the Supreme Court had not passed upon the question whether General Motors had been damaged in its purchases of automotive fabrics and finishes as a result of du Pont's stock ownership. This question was only resolved after the trial before Judge Metzner.

The District Court's initial judgment in favor of defendants after trial was reinstated after being remanded by the Court of Appeals for the Second Circuit for further consideration. *Gottesman* v. *General Motors Corporation*, 279 F. Supp. 361 (1967), *remanded*, 414 F. 2d 956, *on remand*, 310 F. Supp. 1257 (1970). The Court of Appeals then affirmed the decision that General Motors did not suffer any injury and was not damaged in any way in its purchases of automotive fabrics and finishes from du Pont and also that "du Pont had sustained the burden of demonstrating that its transactions with General Motors were scrupulously fair." (436 F.2d 1205, 1212 (2d. Cir. 1971)). The Supreme Court denied plaintiffs' petition for review of the Court of Appeals decision. (403 U.S. 911 (1971)).

With respect to the remaining claims in the *Gottesman* case and the claims in the *Schiff* case, not as yet disposed of, du Pont and General Motors have supplied counsel for the plaintiffs with data, schedules and statements bearing on the question whether there has been a violation of law that has caused injury to General Motors. There are now pending in the *Gottesman* case motions asking judgment against the plaintiffs on all remaining claims in that action.

Further, General Counsel for General Motors on behalf of its management submitted statements to the Court dated October 3, 1973 and September 26, 1975, reaffirming its position that General Motors had not been damaged by any of the matters

alleged in the *Gottesman* and *Schiff* cases and concluding that the further prosecution of these lawsuits would only result in additional expense to General Motors and disruption of its business with no possibility of recovery of damages.

The attorneys for the plaintiffs have filed affidavits setting forth that after detailed review of all past proceedings, the evidence available for use from the government case, and the additional data submitted by du Pont and General Motors, they have reached the conclusion that there is no reasonable prospect of establishing any right to recover from du Pont on behalf of General Motors in connection with any of the remaining claims in the *Gottesman* and *Schiff* cases. Plaintiffs' attorneys, accordingly, are of the opinion that there is no foundation for opposition to the pending dispositive motions in the *Gottesman* case or successful prosecution of the *Schiff* case.

Plaintiffs have also indicated that in their opinion it would not be advisable for them to incur the substantial additional expenses that would be involved in the continuation of the litigation, which would probably be protracted over a period of years.

The Statements to the Court dated October 3, 1973 and September 26, 1975 on behalf of the management of General Motors, described above, are additional significant factors justifying dismissal of these actions particularly in view of the lapse of time since du Pont completed its divestiture of General Motors stock, the fact that no du Pont nominee has been a member of the General Motors Board of Directors since November 1959, and the evolutionary changes in the management of General Motors that have since taken place.

There are presently pending applications by General Motors and by du Pont in which they request the District Court to enter judgments against the plaintiffs in the *Gottesman* case for costs aggregating $35,691.75 as a result of the prior proceedings. These applications are opposed by plaintiffs who have requested the Court in its discretion to deny them. Disposition of these applications will be made in connection with the proposed final judgments of dismissals.

In the *Gottesman* case, plaintiffs have reserved their right to apply for payment by defendants of their reasonable counsel fees and expenses. Plaintiffs' attorneys, Messrs. Netter Dowd Ness Alfieri & Stern, 660 Madison Avenue, New York, New York 10021 (whose predecessor, Netter & Netter, was designated General Counsel for Plaintiffs by order of Hon. Edward Weinfeld, District Judge, dated July 3, 1958) have indicated that for their services rendered since 1957, they intend promptly after entry of final judgment of dismissal, to apply or claim on behalf of themselves and the various counsel associated with them over the years, for payment by defendants of an aggregate fee of one million dollars, together with the sum of $345,059.94 for their disbursements

and expenses. du Pont and General Motors will each oppose such application or claim for award of fees and disbursements. It has not been determined whether counsel for plaintiffs are entitled to any such award and it should not be assumed in considering the proposed dismissal of these actions that the Court will award counsel for plaintiffs fees, disbursements or expenses in the requested amounts, or in any amount.

The Hearing

Any holder of shares of General Motors Corporation common stock may appear at the hearing personally or by counsel and show cause, if he has any, why the derivative claims asserted on behalf of General Motors in the *Gottesman* and *Schiff* actions should not be dismissed on the merits and with prejudice, and why final judgments should not be entered thereon. Any objecting stockholder may present any evidence that is proper and relevant to the issues to be heard, provided, however, that no objections and no memoranda or evidence in support thereof will be considered by the Court unless such objections and memoranda, together with an offer of proof of such evidence, have been filed in writing with the Court and served upon each of the following on or before January 5, 1976:

Netter Dowd Ness Alfieri
& Stern Esqs. and David Brady, Esq.
660 Madison Avenue
New York, New York 10021
Counsel for Plaintiffs

William A. Grier, Esq.
and Edward B. Wallace, Esq.
Room 2600
767 Fifth Avenue
New York, New York 10022
Attorneys for General Motors

Daniel M. Gribbon, Esq.
of Covington ~~and~~ Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Counsel for du Pont

Proof of service upon the aforesaid attorneys shall also be filed with the Court. Any holder of General Motors common stock who does not make his objection in writing shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to dismissals of these actions.

In the event that the Court approves such dismissals, final judgments will be entered dismissing the claims as to both defendants on the merits and with prejudice.

For a complete and detailed statement of the matters involved in these actions, reference is made to the pleadings and all other papers filed in these actions, all of which may be inspected during normal business hours at the office of the Clerk of the United States District Court for the Southern District of New York, United States Court House, Foley Square, New York, New York 10007.

Dated: New York, N.Y.
October 24, 1975

RAYMOND F. BURGHARDT, Clerk
United States District Court
Southern District of New York

G.M. PUBLIC RELATIONS (3rd Quarter Report) — 5122
TPH-5—10-28-75

42a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

GOTTESMAN : Docket No. 121 - 251

v. :

GENERAL MOTORS, et al. :

- - - - - - - - - - - - - - - - - - - x

SCHIFF : 63 Civ. 533 (C.M.M.)

v. :

GENERAL MOTORS, et al. :

- - - - - - - - - - - - - - - - - - - x

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JAN 5 11 53 AM '76

NOTICE OF APPEARANCE AND NOTICE OF CLAIM

SIRS:

PLEASE TAKE NOTICE THAT the undersigned hereby appears pursuant to Notice of the Clerk of the Court dated October 24, 1975 at the hearing to be held January 23, 1976; and upon all proceedings heretofore had herein and by this reference incorporates Application for Order Determining Counsel Fee dated March 8, 1972, heretofore served and filed herein, and hereby renews said application to be heard and determined by the Court.

Yours, etc.

DATED:

New York, New York

December 31, 1975

Clendon H. Lee
Office & P. O. Address
90 Park Avenue
New York, N. Y. 10016
Tel: (212) 953 - 9225

TO: Raymond F. Burghardt, Clerk
United States District Court
Southern District of New York

NETTER DOWD NESS ALFIERI & STERN, ESQS.
and David Brady, Esq.
660 Madison Avenue
New York, New York 10021
Counsel for Plaintiffs

WILLIAM A. GRIER, ESQ.
and EDWARD B. WALLACE, ESQ.
Room 2600
767 Fifth Avenue
New York, New York 10022
Attorneys for General Motors

DANIEL M. GRIBBON, ESQ.
of Covington & Burling
888 Sixteenth Street, N.W.
Washington, D. C. 20006
Counsel for du Pont

44a

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

I, Athena Cokkinos , being duly sworn, depose and say that I am over 18 years of age, am not a party to the action and reside at 31-76 46 Street, Long Island City, N.Y. That on the 5th day of January , 1976 I served the within NOTICE OF APPEARANCE AND NOTICE OF CLAIM upon Netter Dowd Nessa Alfieri & Stern, Esqs. and David Brady, Esq. at 660 Madison Avenue, New York, N. Y. 10021, Counsel for Plaintiffs, William A. Grier, Esq. and Edward B. Wallace, Esq., Room 2600, 767 Fifth Avenue, New York, N. Y. 10022/ Attorneys for General Motors and Daniel M. Gribbon, Esq. of Covington & Burling, 888 Sixteenth Street, N.W., Washington, D. C. 20006, Counsel for du Pont, the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Athena Cokkinos

Sworn to before me this
day of January , 1976.

Notary Public

45a

GEORGE S. HILLS
LENORE B. STOUGHTON
MERCER L. STOCKELL
WILLIAM F. WEIGEL
ALFRED P. O'HARA
SIDNEY P. HOWELL
WALTER T. FAULKNER
W. HUBERT PLUMMER
WILLIAM H. GRIESAR
KENNETH L. EVERETT
CLENDON H. LEE
R. TIMMIS WARE
MARIE V. DRISCOLL
JAMES B. SWIRE
GREGOR F. GREGORICH

MICHAEL I. DAVIS

FREDERICK A. NICOLL
ARTHUR J. HEATH
SERGE B. HADJI
JAMES N. BLAIR
STEVEN NACLERIO
J. MARK EVANS
EDWARD B. PENNFIELD
PAUL L. KENNEDY
BRIAN J. CALVEY
JULIAN L. PEABODY
LILE H. DEINARD
JEFFREY W. HERRMANN
RICHARD J. SCHULMAN
WILLIAM R. GOLDEN, JR.
WILLIAM J. FOSTER, IV

ROGERS HOGE & HILLS
90 PARK AVENUE
NEW YORK 10016
(212) 953-9200

FRANK H. GORDON
JOHN F. HOLDEN, JR.
RUSSELL G. PELTON
COUNSEL

EDWARD S. ROGERS
(1875-1949)
JAMES F. HOGE
(1901-1972)

CABLE ADDRESS "RAMERICA"
ITT TELEX 423564
RCA TELEX 238605

ONE NORTH BROADWAY
WHITE PLAINS, N. Y. 10601
(914) 761-0500

U.S. DISTRICT COURT
FILED
JUL 12 1977
S. D. OF N.Y.

January 22, 1976

BY HAND

Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: Gottesman v. General Motors, et al,
Docket No. 121 - 251, and
Schiff v. General Motors, et al.
63 Civ. 533

Dear Judge Metzner:

I had thought it clear, but to prevent any misunderstanding, I hereby request deferment of any consideration of my claim for counsel fees until the hearing on the application by plaintiffs' counsel for an allowance of their counsel fees and expenses.

Very truly yours,

Clendon H. Lee

Clendon H. Lee

cc: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
JAN 26 1976
S. D. OF N. Y.

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs,	)	
v.	)	Civil Action No. 121-251
GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	)	

ORDER DISMISSING ACTION WITH PREJUDICE

This Court having ruled after trial that final judgment should be entered dismissing plaintiffs' claims that defendant General Motors Corporation was unlawfully injured in its purchases of automotive fabrics and finishes; this Court having entered final judgments dismissing on the merits the first, second, and ninth causes of action of the amended consolidated complaint, insofar as they pertain to automotive fabrics and finishes, and awarding defendants their costs; the United States Court of Appeals for the Second Circuit having affirmed with costs the judgment of this Court; the United States Supreme Court having denied plaintiffs' petition for review of the Court of Appeals decision; and

Defendant E. I. du Pont de Nemours & Company having filed motions for summary judgment and/or dismissal of each claim for relief thereafter remaining in this consolidated action; defendant General Motors Corporation having filed a memorandum in support of such motions; counsel for plaintiffs having reported to the Court their inability, on the law and

MICROFILM

the evidence, to offer a meritorious opposition to any of such motions and their conclusion that dismissal of such remaining claims for relief would be in the best interests of General Motors Corporation and its shareholders; the holders of the common stock of General Motors Corporation having received written notice and been given the opportunity to appear and to object to dismissal with prejudice of such remaining claims for relief in accordance with the provisions of Rule 23.1, Fed. R. Civ. P.; a hearing having been held by this Court on January 23, 1976, to consider whether such a dismissal would be fair, proper, reasonable and in the best interests of General Motors Corporation and its stockholders; and

The Court having considered all the foregoing, and being of the opinion that it is fair, proper, reasonable and in the best interests of General Motors Corporation and its stockholders to dismiss with prejudice the third through eighth and the tenth through fourteenth causes of action of the amended consolidated complaint, and the first, second and ninth causes of action of the amended consolidated complaint inscfar as they pertain to matters other than automotive fabrics and finishes, being all of the claims for relief remaining in this consolidated action, and that final judgment should be entered dismissing this consolidated action with prejudice;

It is hereby ORDERED, ADJUDGED and DECREED, that final judgment should be entered dismissing this consolidated action with prejudice and without costs. Plaintiffs may apply at the foot of this judgment within 90 days of the date hereof for an award of counsel fees, disbursements and expenses as referred to in the notice of hearing of the application for this date.

CMM

s/Charles H. Metzner
U.S.D.J.

January 23, 1976

JUDGMENT ENTERED 1/29/76
s/Raymond F. Burghardt
CLERK

482

FINAL

SUBMITTED TO CMM - 4/2-/76

ABA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CALLMAN GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. duPONT de NEMOURS & COMPANY,

Defendants.

NOTICE OF MOTION

Civil Action No. 121 - 251

- x

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Richard Netter, sworn to April 21st, 1976, the Clerk's Civil Docket entries, the papers on file in the above action and companion case of Schiff v. General Motors et al. (Civil Action No. 63 Civ. 533), the Court's minutes, and all proceedings heretofore had herein, and in accordance with leave granted in the judgment of dismissal dated January 23, 1976, the undersigned will move before the Hon. Charles M. Metzner at the Federal Court House, Foley Square, New York, N. Y., on such date as may be fixed by the Court,

FOR AN ORDER, to be included at the foot of the aforesaid judgment dated January 23, 1976, granting plaintiffs' application for payment by defendants of the reasonable counsel fees of plaintiffs' attorneys together with their disbursements and expenses in the prosecution of the action, and for such other and further relief as may be just and proper in the premises.

New York, N. Y.
April 21st, 1976.

Yours, etc.

NETTER DOWD NESS ALFIERI & STERN

By /s/ Richard Netter
A Partner

General Counsel for Plaintiffs

TO: DANIEL M. GRIBBON, ESQ.
COVINGTON & BURLING
Attorneys for Defendant E. I. duPont de Nemours & Co.
888 Sixteenth Street, N. W.
Washington, D. C. 20006

WILLIAM A. GRIER, ESQ., and
EDWARD B. WALLACE, ESQ.
Attorneys for Defendant General Motors Corp.
767 Fifth Avenue
New York, N. Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER, Plaintiffs, v. GENERAL MOTORS CORPORATION and E. I. duPONT de NEMOURS & COMPANY, Defendants.	AFFIDAVIT Civil Action No. 121 - 251

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD NETTER, being duly sworn, deposes and says that he is an attorney duly admitted to practice in this and other courts and is Senior Partner in the firm of Netter Dowd Ness Alfieri & Stern, which is successor to Netter & Netter.

Pursuant to an order of this Court (Weinfeld, J.) dated July 3, 1958, the latter firm was designated General Counsel for the plaintiffs in the above consolidated derivative stockholders' action instituted on behalf of General Motors Corp. against duPont (hereafter referred to as the Gottesman case). Deponent has been actively associated with this case ever since its inception and is fully acquainted with the facts and proceedings.

Deponent respectfully submit this affidavit in support of plaintiffs' application for payment of their attorneys' reasonable counsel fees for services rendered since 1957 in the prosecution of the above action and their disbursements and expenses.

This application is being made by plaintiffs pursuant to

leave granted by Hon. Charles M. Metzner, District Judge, contained in a judgment of dismissal dated January 23, 1976, which provides:

> "It is hereby ORDERED, ADJUDGED and DECREED, that final judgment should be entered dismissing this consolidated action with prejudice and without costs. Plaintiffs may apply at the foot of this judgment within 90 days of the date hereof, for an award of counsel fees, disbursements and expenses as referred to in the notice of hearing of the application for this date.
>
> /s/ Charles M. Metzner
> U. S. D. J.
>
> "Judgment entered 1/27/76
> Raymond Burghardt,
> Clerk"

By order dated October 6, 1959 (Ryan, C. J.) the Gottesman action was referred to Judge Metzner for all purposes. The Court accordingly has personal knowledge of practically all of the various steps and proceedings taken in this action and the services rendered by plaintiffs' counsel.

In connection with this application we shall discuss the background of the events leading to the institution of the Gottesman case, a description of the various categories of services rendered by plaintiffs' attorneys, the amount of counsel fees and expenses requested and the propriety of granting such relief.

(A) Background

In 1949 a civil suit was instituted by the Government in the Federal District Court for the Northern District of Illinois entitled U. S. v. duPont et al. In that suit the Government sought a judgment declaring, among other things, that duPont had violated the Sherman and Clayton Antitrust Acts in connection with its sales of various products to and dealings with General Motors and that such violation occurred by virtue of duPont's having a 23%

controlling stock interest in General Motors for many years and that it used said stock interest for its own purposes and in violation of law. Included in the products were automotive fabrics and finishes.

After a lengthy trial in the District Court before LeBuy, J., the complaint was in all respects dismissed upon the merits, the Court holding that the Government had not proved any violation of the antitrust laws with respect to any of the products (126 F. Supp. 235).

Thereafter, an appeal was taken by the Government upon the ground that the facts established that duPont had violated both the Sherman and the Clayton Acts. On June 3, 1957, the Supreme Court reversed (U. S. v. duPont, 353 U. S. 586). It held that duPont had violated the Clayton Antitrust Act in connection with its sales of automotive fabrics and finishes to General Motors. Since this holding, as the Court noted later, "sufficed to dispose of the case," it did not decide "whether duPont had also violated the Sherman Act" (366 U. S. at 316, note 1, and 353 U. S. at 588, note 5). Further, the Court did not pass upon any of the items sold by duPont to General Motors other than automotive fabrics and finishes and remanded the matter to the District Court for the entry of proper relief.

When upon remand the District Court failed to direct divestiture of duPont's 23% stock in General Motors (177 F. Supp. 1) the Government took a second appeal. The Supreme Court again reversed (366 U. S. 316) holding that only full divestiture by duPont would afford adequate relief.

In deciding that duPont had violated the Clayton Act, the Supreme Court was not required to find and did not find that General Motors had in fact been damaged or the extent thereof. The determination of that question was left open.

The adjudication obtained by the Government involved two of the largest industrial companies in the country. The holding that duPont had engaged in unlawful activities in its dealings with General Motors aroused enormous interest in judicial and business circles as well as with the general public. This adjudication by the highest Court called for a prompt, thorough and independent investigation and hearing before some forum for a determination whether General Motors had in fact been damaged as a result of the unlawful actions of duPont over the many years. The opinions of the Supreme Court upon both appeals clearly pointed to the need for such an independent judicial determination.

In significant holdings the Supreme Court said the following: "We held that duPont's acquisition of the 23 per cent of General Motors stock had led to the insulation from free competition of most of the General Motors market in automobile finishes and fabrics * * *" (366 U. S. at 318, 319); "The inference is overwhelming that duPont's commanding position was promoted by its stock interest and was not gained solely on competitive merit" (353 U. S. at 605); "But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that duPont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics" (353 U. S. at

606); that the "acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition * * *" (353 U. S. at 589); that the result of the Government suit should "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (366 U. S. 323, quoting from International Salt Co., 332 U. S. 392, 401); that "The key to the whole question of antitrust remedy is of course the discovery of measures effective to restore competition" (366 U. S. 326); that it was necessary that there be "dissolution of the intercorporate community of interest which we found to violate the law" since if continued, this would "induce General Motors to favor duPont, the very result which we found illegal on the first appeal" (366 U. S. 331); and that over the years General Motors management "has become accustomed to duPont's special relationship" (366 U. S. 332). (emphasis added)

As a result of such findings, the compelling question -- not resolved by the Supreme Court -- was whether as a result of the illegal activities of duPont, General Motors had been damaged and the extent thereof. This question had to be squarely faced and independently and fairly determined. In view of the existence of the unlawful actions over the many years, the independent investigation and judicial determination had to be undertaken promptly to avoid the further running of the statute of limitations against any claim General Motors might have against duPont. Such an investigation and litigation to be at all meaningful, obviously, would have to be undertaken by parties acting independently and free from the influence of General Motors' Administration.

The interests of General Motors' stockholders clearly required a judicial determination of the fact and extent of damages caused by duPont's actions during the decades of its stock ownership and control involving hundreds of millions of dollars of business transactions.

Further, strong public policy dictated such an independent suit and judicial determination after the Government had obtained an adjudication in the Supreme Court of violation of the antitrust laws by duPont. The statute itself (15 U.S.C.A. §§15, 16) encourages and facilitates a supplemental private civil suit, implementing the Government suit, for the recovery of damages sustained by an injured party. So the statute provides for treble damages and permits the Government judgment or decree and findings to be used in the private suit with prima facie effect, and tolls the statute of limitations during the pendency of the Government proceedings.

This public policy was recognized by the Court of Appeals in the instant case (414 F. 2d 956) when in permitting a suit for damages in connection with duPont's Clayton Act violation, it quoted (p. 961) the following from Minnesota Mining, 381 U. S. 311, 318:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."

In Atlantic City Electric Co. v. General Electric Co., 226 F. Supp. 59 (appeal denied 337 F. 2d 844), Judge Feinberg stated (71):

> "Finally, the most significant consideration is the strong public policy in favor of private treble-damage actions, which are intended not only to compensate those injured by violation of antitrust laws, but also to function as an independent method of enforcing antitrust policy."

In his March 15, 1963 opinion Judge Metzner stated (p. 5):

> "The reason for the tolling of the statute is to permit the private litigant to rely on the fruits of the government litigation." (citing cases)

This strong statutory policy favoring such supplemental suit was particularly applicable here because of the dominant positions duPont and General Motors enjoyed in American industry, the hundreds of thousands of stockholders in these corporations scattered all over the world, the fact that duPont for many years held "practical control" over General Motors and used such control in its dealings with General Motors, the long and close inter-company relationship that developed and continued between the companies, the potential liability of duPont to General Motors for large sums, the need for public confidence in the proper administration of such large companies and their compliance with the laws and their accountability for breach thereof and, finally, the strong beneficial and therapeutic effect such an investigation and judicial determination would have upon the companies themselves, upon industry and the general public.

But, both before and even after divestiture was ordered by the Supreme Court, General Motors refused and failed itself to institute suit by its own counsel or even to cause an independent investigation and suit by outside counsel. On the contrary, throughout the Gottesman case General Motors at every stage of the proceedings opposed and impeded plaintiffs' efforts in the prosecution of the action; it has taken positions in each instance closely paralleling those of duPont and adopted a hard, adversary position even though it was to be beneficiary of any recovery obtained.

Even after the Court of Appeals refused to review the denial of the motion of both defendants to dismiss the Gottesman complaint and approved the propriety and desirability of its institution and continuation, General Motors still did not change its position. Instead, General Motors consistently joined with duPont in attempting to make difficult proof of plaintiffs' claims and limit and defeat any recovery against duPont.

(B) The Nature of the Services Rendered

Shortly after the Supreme Court rendered its first decision against duPont in 1957, the Gottesman case and other stockholders' derivative suits were instituted on behalf of General Motors against duPont and General Motors. The allegations in these suits were predicated upon the Supreme Court decision. By order of Hon. Edward Weinfeld dated July 3, 1958, these derivative suits were consolidated, other similar suits stayed, and the firm of Netter and Netter designated as General Counsel in the consolidated suit. Previously an application by the defendants to change the venue of the action to Delaware was denied by order of Judge Kaufman on January 24, 1958.

The amended consolidated complaint contains fourteen separate causes of action in which claims were asserted against duPont on behalf of General Motors for violation of the Sherman and Clayton antitrust laws and under the common law for violation by duPont of its fiduciary obligations to General Motors in the use for its own purposes of the "practical control" it held over General Motors. These causes of action involved sales by duPont to General Motors of automotive fabrics and finishes and other products.

After this consolidation, the plaintiffs in the action were Rita Gottesman, Paul S. Peyser, Maria Mattiello and Arlyne Zucker. Deponent's firm had represented Peyser, whose stock ownership began on May 4, 1950, while the other plaintiffs had been represented by other counsel.

Rita Gottesman died on September 13, 1963, and her husband, Callman Gottesman, was substituted in her place. After suit was instituted, plaintiff Zucker failed to appear for examination and she was dismissed as a party plaintiff by order dated March 1, 1960. Plaintiff Mattiello was examined by defendants and thereafter the Court found on May 10, 1961, that she did not prove that her stockholdings had their origin as alleged and that her holdings only began on February 12, 1951.

As a result of these holdings, upon motion of the defendants, the Court ruled on July 10, 1961, that plaintiffs, under Section 23, were limited to a recovery of whatever damages may have been sustained by General Motors only subsequent to May 4, 1950.

Plaintiffs' Counsel, keenly conscious of their obligations took every legal step to expose all of the facts to judicial scrutiny and to establish applicable legal principles -- all of which was rendered more difficult by the continuous opposition of both of the defendants. The services rendered by Plaintiffs' Counsel may be considered in connection with plaintiffs' following purposes and objectives:

(A) To first establish plaintiffs' equitable cause of action and right to sue duPont derivatively on behalf of General Motors in view of the latter's failure and refusal itself to

obtain a judicial determination;

(B) To enable plaintiffs to be in such a position as to recover the maximum damages to which General Motors might be entitled against duPont, unhindered by any position General Motors may have taken or was taking;

(C) To establish that the adjudication by the Supreme Court that duPont had violated the Clayton Act did give rise to a cause of action for damages on behalf of General Motors and that the significant findings of the Supreme Court were entitled to be used with prima facie effect;

(D) To establish judicially whether General Motors had in fact been damaged in connection with its purchases of automotive fabrics and finishes, the products passed upon by the Supreme Court, as a result of duPont's violation of the antitrust laws or breach of the fiduciary obligation which it owed General Motors by reason of its controlling stock interest and use thereof;

(E) Under an agreement made among counsel for all parties after dismissal of the claims pertaining to automotive fabrics and finishes, plaintiffs' General Counsel in conjunction with counsel in Schiff, agreed to review all of the evidence previously submitted as well as new proof submitted by defendants to them and then to report to the Court whether it would be in the best interests of the stockholders of General Motors and General Motors itself to continue with the prosecution of the remaining claims in the Gottesman case and the claims asserted in the companion Schiff case.

We will discuss each of the foregoing categories of services and the results accomplished.

(A) The Establishment of Plaintiffs' Right to Sue duPont Derivatively for the Benefit of General Motors

The preliminary equitable cause of action giving plaintiff-stockholders the right to sue in the name of General Motors is separate and apart from the derivative cause of action for damages against duPont. This cause of action would have to be sustained at the threshold before the merits of the claim could be considered.

However, at the very outset both defendants sought to block completely any judicial determination at all as to whether General Motors had been damaged. Before serving their answer in the Gottesman case, duPont as well as General Motors moved to dismiss the complaint claiming that plaintiffs had no standing to sue.

After submission of lengthy papers, briefs and argument, defendants' application was denied by order of Judge Sugarman dated March 24, 1959, in an opinion (171 F. Supp. 661). Thereafter defendants sought leave to appeal to the Court of Appeals. The application was argued and denied (268 F. 2d 194); and reargument was also denied on August 22, 1959. In denying defendants' application, the Court indicated that "the chance of reversal here seems so slight as to be quite negligible." (p. 196).

In its opinion the Court also found that the derivative suit was properly instituted and should be continued. It stated (197):

> " * * * the wrongful acts alleged -- violations of the antitrust laws by duPont -- can in no way be ratified or rectified by a vote of the shareholders of General Motors.
>
> "In short, the question before these shareholders, were a poll of them here to be ordered, would be not whether this action should be stopped but merely who ought most properly to press it forward." (emphasis added).

The Court went on to note (198):

> "We recognize that defense of a minority suit of this kind may be hard and expensive. But no substitute method of minority corporate supervision has yet been developed. * * * A decision such as that of the Supreme Court in the duPont case is almost sure to result in stockholder attack which must be met sooner or later, if not at the hands of these self-appointed fiduciaries, then of some others." (emphasis added).

(B) To Enable Plaintiffs to Recover the Maximum Damages on Behalf of General Motors and Not be Barred or Limited by any Position Taken by It.

In the prosecution of the Gottesman case, Counsel sought to recover maximum benefits for General Motors. As noted above, when the claims of the plaintiffs, Zucker and Mattiello, who had been originally represented by other counsel, were limited or dismissed after the Court had given them every opportunity to prove the extent of their stockholdings, General Counsel found that the remaining plaintiff-stockholders were unable under the Court's ruling on July 10, 1961, to recover any damages prior to May 4, 1950, the date plaintiff, Peyser, acquired his stock.

Accordingly, General Counsel cooperated with efforts made by other General Motors stockholders -- whose holdings arose long prior to May 1950 -- to intervene in the action. The several applications to intervene, which would have enlarged the period for recovery, were opposed by both duPont and General Motors and denied by the Court on March 30, 1960 and March 18, 1963, because of the early injunctive order dated July 3, 1958.

Thus, plaintiffs, had they been successful at the trial, could not have recovered all of the damages which General Motors, itself, would have been entitled to recover if it had been the plaintiff.

To overcome this limitation, in 1963 a separate derivative action (63 Civ. 533) by a General Motors' stockholder, Margo Schiff, was timely instituted in this Court. Plaintiff was represented by David Brady, Esq., of O'Connor & Farber, who had been serving since 1962 as Trial Counsel in the Gottesman case. The Schiff case contained causes of action similar to those alleged in the Gottesman case but also contained allegations that plaintiff's stockholdings originated as far back as 1936.

An application was then made to consolidate the Schiff and the Gottesman cases. The application was opposed by both duPont and General Motors and denied by order dated March 15, 1964, the Court predicating its decision also upon the early injunctive order. The time of defendants in the Schiff case to answer was extended until after the final determination of the Gottesman case. As a result the Schiff case remained in abeyance until it was dismissed in conjunction with the Gottesman case on January 23, 1976, as will be hereafter discussed.

Although effectively stayed, the Schiff case served a beneficial purpose, for, if the plaintiffs in the Gottesman case had prevailed, the stockholders of General Motors would not have been limited in their efforts to obtain maximum recovery for General Motors.

During the course of the Gottesman case duPont -- joined in by General Motors -- also attempted to bar plaintiffs from asserting their claims by urging that in the Government case General Motors did not take such a position and the plaintiffs were thus now barred under the doctrine of preclusion against inconsistent positions. The application by duPont to bar plaintiffs was

denied by the Court in an opinion and order dated October 7, 1963.

Further, duPont pleaded various statutes of limitations to bar or limit plaintiffs' claims. However, although General Motors was to be the beneficiary of any recovery obtained by plaintiffs, it also itself pleaded statutes of limitations to limit or bar its own recovery.

The Court passed upon the various questions of limitations in an opinion and order dated March 15, 1963, which it amplified in a subsequent opinion and order dated October 4, 1963, pertaining to the relation back of the various claims asserted in plaintiffs' amended complaint.

(C) The Establishment of a Cause of Action by General Motors for Damages under the Clayton Act and the Use of the Judgment and Findings of the Supreme Court.

As already indicated, supra, p. 6 , the statute encourages the institution of civil damage suits following a judicial determination of a violation of the antitrust laws not only by providing for treble damages, but also by authorizing the use of the Government judgment and decree and findings with prima facie effect in the subsequent civil suit. Of course, this greatly simplifies and considerably reduces the expenses in the preparation and trial of a damage suit. This was particularly true in the Gottesman case where the issues were complex and ascertainment of all relevant facts difficult -- all of which were made even more so by the adversary posture adopted by General Motors.

From the very beginning of the Gottesman case plaintiffs took the position that the Supreme Court adjudication of duPont's Clayton Act violation did give rise to a cause of action for

damages and that under the statute, plaintiffs were entitled to use the judgment and findings of the Supreme Court with prima facie effect.

However, both defendants disagreed and disputed the foregoing. They repeatedly urged that plaintiffs were entitled to no benefit from the Supreme Court judgment or findings claiming the following: (1) The adjudication was simply that duPont had violated the Clayton Act and this could not furnish a basis for any cause of action for damages by General Motors (or anyone else); (2) Plaintiffs were not entitled to use the judgment or findings with prima facie effect or in any other significant respect; and (3) To prove any Sherman Act violation, plaintiffs had to submit independent proof unsupported by any prima facie findings or judgment.

A determination of the validity of the position adopted by both defendants would acutely affect the preparation and trial of the action. The Court recognized this and properly entertained argument and submission of pre-trial memoranda in that connection.

Thereafter, in an opinion dated September 18, 1963 (221 F. Supp. 488) and pre-trial order of November 12, 1963, the Court dismissed plaintiffs' claim for money damages under Section 7 of the Clayton Act. The Court found that a violation of Section 7 of the Clayton Act -- which was the only violation found by the Supreme Court -- could not furnish the base for a subsequent civil suit for damages, and that since plaintiffs could recover damages only after May 4, 1950 (which was subsequent to the institution of the Government suit in 1949) plaintiffs could not rely upon the Supreme Court judgment and had only limited prima facie use of

certain findings.

Nevertheless, the District Court, recognizing that its decision was crucial, certified its order for immediate appeal over the opposition of defendants. Pursuant to such certification, plaintiffs applied for leave to appeal. Both defendants opposed the application. The Court of Appeals denied leave to appeal on January 31, 1964. An application was made by plaintiffs to have the Supreme Court review the matter, which was opposed by defendants. Certiorari was denied (379 U. S. 882), as was rehearing (379 U. S. 940).

Accordingly, plaintiffs had to rely solely upon independent proof of a Sherman Act violation and breach of common law duty. As plaintiffs were deprived of the statutory evidentiary aids, the preparation of the case for trial and the trial were rendered inordinately time-consuming and expensive.

After plaintiffs had completed their trial preparation, a protracted trial (which will be described, infra) was held, limited to a determination whether duPont had damaged General Motors in its sales of automotive fabrics and finishes, the quantum of damages to be determined later if plaintiffs prevailed. After trial the complaint was dismissed, the Court rendering on December 13, 1967, a comprehensive opinion (279 F. Supp. 361).

After a hearing, the Court made an order dated February 20, 1968, in which it found, over defendants' opposition, that more than one claim for relief was presented and directed the entry of final judgment pursuant to Rule 54(b) "on the ground that there is no just reason for delay."

Thereupon, plaintiffs filed their appeal and both

defendants then objected and moved to dismiss the appeal. The Court of Appeals denied defendants' motion (401 F. 2d 510) and entertained the appeal.

Thereafter a record was prepared and extensive briefs were submitted by the parties and the appeal was argued on April 14, 1969.

On August 13, 1969, the Court of Appeals rendered an opinion (414 F. 2d 956). It did not pass upon plaintiffs' contentions that duPont had damaged General Motors by reason of its violation of the antitrust laws and common law fiduciary obligations. It held that the Supreme Court's adjudication that duPont had violated the Clayton Act did give rise to a cause of action for damages in favor of General Motors, that even though plaintiffs were prevented from recovering damages prior to May 4, 1950, they could still use the judgment and significant findings with prima facie effect, and remanded the case for further proceedings.

As a result of the services rendered by Plaintiffs' Counsel, in the face of the opposition of duPont as well as General Motors, it was thus established that the adjudication by the Supreme Court of the Clayton Act violation by duPont did create a cause of action for damages in favor of General Motors against duPont and that the plaintiffs were permitted to use the judgment and findings with prima facie effect.

The importance of this result was noted by the Court of Appeals for the Third Circuit in NBO Industries Treadway Cos. Inc. v. Brunswick Corp., 523 F. 2d 262, when it stated (p. 272):

> "On appeal from this final judgment the Second Circuit reversed the earlier interlocutory holding that a §7 violation could not be the basis for a §4 recovery. Gottesman v.

General Motors Corp., 414 F. 2d 956 (2d Cir. 1969). (Gottesman I). * * * The great significance of Gottesman I was that it did not hold that only those foreclosed from the General Motors market could recover. General Motors itself, which was not in the fabrics and finishes business, could recover as well."

(D) Determination of the Issue as to Whether General Motors Had Been Damaged.

In view of the enormous complexity of the action and the various causes of action, it was agreed by the parties and the Court approved by order, that the trial would be initially limited to automotive fabrics and finishes since these products were the only ones passed upon by the Supreme Court in its decision. The Court further approved the parties' agreement that the initial trial would be confined to a determination whether General Motors had in fact sustained any damages as a result of duPont's sale to it of automotive fabrics and finishes; and if the Court found in the affirmative, then the quantum of the damages would be determined at a later trial.

Pre-Trial Disclosure

In order to facilitate pre-trial disclosure it was agreed and approved by the Court that the Record of the Government case and exhibits could be used by either party with the right of the plaintiffs to cross-examine any of such witnesses whose testimony the defendants wished to use. Under that agreement, extensive cross-examinations were conducted by plaintiffs of Messrs. Sloan, Pratt, Wirshing, Weckler and numerous other persons.

Lengthy interrogatories and cross-interrogatories were served and answered. Extensive examination of records was conducted in Wilmington, Detroit and New York by plaintiffs' counsel. In

preparation for trial, further depositions of witnesses were taken by plaintiffs in Wilmington, Detroit, New York and other places.

In order to determine the scope of the claims and the validity of the various defenses, numerous memoranda were prepared by counsel and submitted and the Court rendered various pre-trial orders and opinions.

In the preparation for trial and ascertainment of relevant facts, plaintiffs were severely hampered by their inability to obtain from defendants certain data and records, some of which, it was claimed, had been lost or destroyed.

Early in the case certified public accountants were called in by General Counsel to assist in pre-trial preparation and for their actual assistance and testimony at the trial. They rendered extensive services over the years. Expert witnesses were questioned.

Subsequent to the assignment of the Gottesman case for all purposes to Judge Metzner and prior to trial, 14 pre-trial conferences were held and the pre-trial transcripts totalled 1,316 pages. Following the trial, at least ten further conferences were held before the Court.

The Trial and Dismissal of the
Causes of Action Pertaining to
Automotive Fabrics and Finishes.

On November 21, 1966, the trial of the Gottesman action, limited to the claims involving automotive fabrics and finishes, commenced. This trial continued through January 26, 1967. It covered a period of 36 trial days. The trial transcript comprised almost 10,000 pages; over 1,000 exhibits were introduced; the testimony of 24 witnesses was taken.

After the trial, counsel for plaintiffs prepared and served and filed comprehensive proposed findings of fact and conclusions of law, a post-trial memorandum and reply memorandum.

On December 13, 1967, a lengthy opinion was filed by Judge Metzner dismissing the claims of the Gottesman complaint involving automotive finishes and fabrics (279 F. Supp. 361). A judgment to this effect was subsequently filed. Plaintiffs appealed from that judgment. In the prosecution of the appeal, Counsel prepared a lengthy appendix and a comprehensive brief on appeal, and the appeal was thereafter argued.

On August 13, 1969, the Court of Appeals filed its order and opinion (414 F. 2d 956) remanding the action to the Southern District for further proceedings.

In remanding, the Court held, as we have noted (supra, pp.14-18), that a private claim for damages may arise as a result of a violation of Section 7 of the Clayton Act. The Court also held that greater evidentiary weight should have been given to the Government judgment and the ultimate facts in the Government suit should have been given prima facie weight in the light of the Supreme Court decisions. Plaintiffs had thus established significant principles of antitrust law.

Upon remand, further proceedings were held before Judge Metzner. Counsel for plaintiffs prepared, served and submitted a brief and reply brief. On March 30, 1970, Judge Metzner filed his opinion in which he dismissed plaintiffs' claims with respect to automotive fabrics and finishes (310 F. Supp. 1257). A judgment was entered to this effect, from which plaintiffs again appealed.

This judgment was affirmed on January 4, 1971 (436 F.2d 1205). In its opinion the Court of Appeals found that plaintiffs

had not established that General Motors had been damaged in connection with duPont's antitrust violations and that duPont could not be held liable for breach of any fiduciary obligation, holding (p. 1212) that duPont had sustained its burden of establishing the fairness of its transactions with General Motors.

Upon application by plaintiffs, rehearing was denied on February 1, 1971. Thereafter the United States Supreme Court upon application (403 U. S. 911) and rehearing (404 U. S. 876), declined to review the determination of the Court of Appeals.

(E) Report to the Court by General Counsel.

With the final dismissal of the causes of action pertaining to automotive fabrics and finishes in the Gottesman case, there still remained various other causes of action in the Gottesman case as well as the causes of action in the Schiff case.

Thereafter, by agreement of counsel for plaintiffs and both defendants in the Gottesman and Schiff cases, it was decided that Plaintiffs' Counsel in these cases would review all of the facts -- including new material and data supplied by defendants, and material supplied by duPont in connection with its pending motion in the Gottesman case -- and would then file their report with the Court containing their recommendation whether the further prosecution of the Gottesman and Schiff cases would be in the best interests of the stockholders of General Motors.

Both General Motors and duPont, under the agreement, submitted additional proof to General Counsel and to counsel in the Schiff case. Thereafter General Counsel and their associates, and Schiff counsel, over an extended period, reviewed all of the

existing data and evidence, including the new matter submitted to them by defendants.

Plaintiffs' Counsel in the Gottesman and Schiff cases then made their respective reports and filed them with the Court. In their reports they recommended that it would not be in the best interests of the General Motors stockholders to continue with the suits for upon the facts and law there appeared to be little likelihood of recovery upon the remaining claims and the continuation of the litigation would only entail needless expense to both defendants and plaintiffs.

Accordingly, based upon the reports and stipulations entered into by the parties, applications were made for dismissal with prejudice of the remaining claims in the Gottesman case and claims in the Schiff case. Orders were thereupon made by the Court for notice to the stockholders of the requested relief, the notice also reciting the intent of plaintiffs to apply for their reasonable counsel fees in the sum of $1,000,000 and disbursements and expenses aggregating $345,059.94.

After due notice was given to the stockholders of General Motors as required by the Court order, the matter came on for hearing before Judge Metzner on January 23, 1976. There was no opposition to the applications to dismiss and the Court on that date signed judgments of dismissal with prejudice of the Gottesman and Schiff cases. In the Gottesman judgment the Court included provisions quoted at page 2 , supra, permitting plaintiffs to apply, at the foot of the judgment, for payment by defendants of their reasonable attorneys' fees, disbursements and expenses as referred to in the notice.

The foregoing description of services only briefly outlines the extensive and protracted services rendered by plaintiffs' attorneys. For a further description, the Court's attention is respectfully invited to the entries upon the Clerk's Docket, to the various papers, memoranda, and transcripts on file in the Gottesman and Schiff cases, and to the Court's minutes and notations.

From 1957 to the dismissal of the actions on January 23, 1976, the services were conscientiously rendered by General Counsel and the members of their firm and of other firms and attorneys assisting in this massive litigation. In all there were over twenty attorneys who participated in the prosecution of this case and the various appeals, including David Brady as Trial Counsel and his associate, Clendon H. Lee; Leo Brady and his associates; and Henry L. Bayles and Arthur B. Netter -- all of whom rendered extensive services. In addition, substantial services were rendered by Edward A. Rothenberg, Robert Netter, Abbott Gould, Jesse R. Bacharach, all of whom are now deceased.

Special clerks and stenographers were employed by the various counsel who worked upon this case; voluminous files were maintained; lengthy consultations were had with experts; the accountancy firm of Shmerler & Co. and its partner, Lewis A. Freeman, in particular, worked continuously with counsel on pre-trial preparation, prepared schedules and data and testified at the trial.

The Court to whom the case was assigned for all purposes in 1959 and who continuously presided over the case thereafter is thoroughly familiar, it is respectfully submitted, with the nature of the services rendered by plaintiffs' attorneys, the time require

for these services over the many years, the professional standing of Plaintiffs' Counsel and Associate Counsel and the reasonable value of their services. If, however, the Court desires to have a hearing in connection with the present application, Plaintiffs' General and Associate Counsel stand ready to attend.

Liability of General Motors and duPont

It is respectfully submitted that the Gottesman action was instituted and continued in good faith, that the action necessarily had to be instituted after the Supreme Court decision when General Motors itself failed to institute such action; that the institution and continuance of the action received judicial approval; and that each of the various categories of services to which we have referred benefitted General Motors' stockholders, stockholders in general and the general public, and also served a therapeutic corporate purpose.

It is thus submitted that the counsel fees and expenses in the prosecution of the action and in the preparation and submission of Plaintiffs' Report to the Court in connection with the dismissal of the actions, should equitably be borne by all of the stockholders of General Motors and this should be done by requiring General Motors to make payment.

It is further submitted that duPont likewise is obligated for these counsel fees and expenses for it was the adjudication by the Supreme Court of duPont's violation of the antitrust law which was the underlying cause for the institution of this suit.

Relief Requested

Gottesman has indeed been an unusual and challenging case spanning some nineteen years. It is a case which had to be timely instituted, diligently prosecuted and concluded. Each category of the services heretofore set forth and discussed, we submit, served a beneficial purpose. In view of the particular and unique aspects of this case -- which may fairly be considered sui generis -- we respectfully request that the Court should exercise the broad equitable jurisdiction vested in it and grant plaintiffs' application.

The Notice sent to all of General Motors' stockholders of the hearing on January 23, 1976, recited that plaintiffs intended to apply for attorneys' fees of $1,000,000 and payment of expenses and disbursements aggregating $345,059.94. We respectfully submit that these sums are fair and reasonable and request that the Court grant our application directing such payment by defendants, and for such other and further relief in the premises as may be just and proper.

s/ RICHARD NETTER
Richard Netter

Sworn to before me this
21 day of April, 1976.

Notary Public

HENRY L. BAYLES
Notary Public, State of New York
No. 31 0198400
Qualified in New York County
Cert. filed with New York Co. Clk.
Commission Expires March 30, 19-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs,	:	
- against -	:	Civil Action No. 121-251 (CMM)
GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	:	

OPPOSITION OF DEFENDANT DU PONT TO
PLAINTIFFS' APPLICATION FOR COUNSEL FEES

Plaintiffs invoke this Court's "broad equitable jurisdiction" in asking that defendants be ordered to pay plaintiffs' counsel fees and expenses. (Affidavit of Richard Netter, April 21, 1976, p. 25.)*/ Significantly they cite no statute or decision in support of their application. Such omission on their part is wholly understandable since established principles make clear that there is no basis -- legal or equitable -- on which the Court could order defendants to finance plaintiffs' unsuccessful effort to prove that du Pont had caused injury to General Motors. The

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*/ Hereafter "Netter Affidavit."

order plaintiffs seek is precluded by the Supreme Court's recent reaffirmation of the principles governing fee awards in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), as applied by this Court in Academic Computer Systems v. Yarmuth, No. 73 Civ. 3930 (MP), Apr. 27, 1976 and Korn v. Franchard Corp., No. 67 Civ. 3445 (WCC), July 25, 1975.

For the reasons fully discussed in General Motors' opposition to plaintiffs' application, which will not be restated here, there is no basis for an award against it as the purported beneficiary of this unsuccessful litigation. We shall limit this memorandum to a showing that du Pont cannot under any circumstances be ordered to pay the fees and expenses incurred by plaintiffs in seeking without success to obtain an enormous money judgment against it. */

I. IN THE ABSENCE OF EXPLICIT STATUTORY AUTHORIZATION, DU PONT MAY NOT BE ORDERED TO PAY PLAINTIFFS' COUNSEL FEES.

In no sense was du Pont represented by or intended

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*/ It is unclear whether the separate application for a counsel fee first filed by Clendon H. Lee under the date of March 8, 1972, and thereafter withdrawn and renewed from time to time, is presently before the Court. Although Lee's letter of January 22, 1976, to the Court requests "deferment of any consideration of my claim for counsel fees until the hearing on the application by plaintiffs' counsel . . .," application by him has not been made in accordance with the requirements established by this Court's Order of January 23, 1976. It, in addition, appears that Lee's services have been included among those made the subject of the instant application. See Netter Affidavit, p. 23. If the Lee application remains alive, this memorandum should be viewed as addressed to it as well as to the application that is the subject of the Netter Affidavit.

to benefit from the efforts of plaintiffs' counsel. Du Pont has always been their adversary and the target of their effort to secure sizable money damages. It has always been the established position of the United States courts to require every litigant to bear its own attorney's fees, unless an explicit statute allows imposition of those fees on the adversary. See, e.g., F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 126-131 (1974); Arcambel v. Wiseman, 3 Dall. (3 U.S.) 306 (1796). This rule, codified in the Act of Feb. 26, 1853, 10 Stat. 161, and now found in 28 U.S.C. §§ 1920(a) and 1923, generally limits assessments of the winner's litigation expenses to taxable costs. Accordingly, even if plaintiffs had prevailed, which they did not, they would not in the absence of an explicit statutory provision have been entitled to an order directing du Pont to pay their fees and expenses.

An extensive review of the historical antecedents and repeated applications of this American rule is set forth in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, supra. There the Supreme Court rejected the notion that counsel who by their success confer some public benefit are entitled to fees as a self-appointed "private attorney general:"

> "[T]he rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific

> exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."
> 421 U.S. at 269.
>
> "It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals." Id. at 271.

The only permissible exception to this rule is the equitable principle that allows assessment of a fee against persons or entities who benefit from a lawsuit. But even then the payment may be exacted only "from the fund or property [created by the litigation] . . . or directly from the other parties enjoying the benefit." Id. at 257.*/

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*/ See also, Kopet v. Esquire Realty Co., 523 F.2d 1005, 1007 & n.3 (2d Cir. 1975), which holds that the party against whom the action is brought cannot be held liable for a fee, even where a benefit was conferred, thus warranting an order directing payment of counsel fees by the beneficiary of the suit.

And as Alyeska makes clear, id. at pp. 257-258, it is this principle that underlies such cases as Mills v. Electric Auto-Lite Co., 296 U.S. 375 (1970), on which reliance has been placed in previous efforts to obtain an order directing the payment of an attorney's fee in this case.*/ See Memorandum in Support of Application of Clendon H. Lee for Award of Counsel Fees, March 10, 1972, at pp. 2-10.**/

Where no fund has been created or recovered, as is the case here, this Court has made clear in recent decisions that the benefit that will support an award must be tangible and substantial. Korn v. Franchard Corp., supra, involved a fee application following settlement of a class action. Even though the settlement was followed by the distribution of a contingency fund to holders of interests in a limited partnership, the litigation did not create the fund and accordingly did not "represent any benefit conferred on the class," id., opinion of July 25, 1975, at p. 7, and the fee application was denied. Recognizing that "fees in actions of this type are wholly contingent upon the ultimate success of the action," Judge Conner said,

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*/ Moreover, "The courts have been extremely reluctant to apply the 'common fund' rationale . . . ." In re American Express Warehousing Ltd., 528 F.2d 1012, 1015 (1975).

**/ There is no contention here that fees should be assessed against du Pont on the ground that it has willfully disobeyed a court order or "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." See Alyeska, 421 U.S. at 258-259. Compare Korn v. Franchard Corp., supra, with Saks v. Gamble, 154 A.2d 767 (Del. Ch. 1958), for discussions of whether, and under what circumstances, obduracy or unreasonable conduct by defendants might warrant an assessment of attorneys' fees in favor of a losing plaintiff.

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> "However, this is a two-edged sword.
>
> "Plaintiffs' counsel who accept cases on a contingency basis are well aware of the risks and burdens inherent in prosecuting such suits. They realize that if the benefit ultimately secured for their client is small, their fee must reflect this, and that if they fail to obtain any benefit for their client, their services will go uncompensated." Id. at pp. 9-10.

Even more recently, Judge Pollack rejected an application that followed upon the stipulated dismissal for mootness of Academic Computer Systems v. Yarmuth, supra, because "the litigation was not successful and 'the mere institution of a stockholder's action does not guarantee that the plaintiff will be awarded attorney's fees . . ..'" Opinion of April 27, 1976, at pp. 10-11, quoting from Wechsler v. Southeastern Properties, Inc., 506 F.2d 631, 635 (2d Cir. 1974).

Plaintiffs are in the same position as the unsuccessful litigants in the cases cited above and other similarly decided cases; their efforts have simply not produced any benefit that warrants a fee award. In any event, there is not, and could not be, any claim that du Pont has been benefitted in any way by the 19 years of litigation now drawing to a close. Accordingly, in the absence of some explicit statutory exception to the general rules established by 28 U.S.C. §§ 1920(a) and 1923, no fee may be assessed against du Pont.

II. THE STATUTE APPLICABLE HERE, SECTION 4 OF THE CLAYTON ACT, PROHIBITS AN AWARD TO PLAINTIFFS BECAUSE THEY HAVE NOT SHOWN THAT DU PONT'S VIOLATION CAUSED DAMAGE TO GENERAL MOTORS.

The statutory provisions governing assessment of attorneys' fees in this case is Section 4 of the Clayton Act, 15 U.S.C. § 15. That provision would have allowed the addition of a reasonable attorney's fee to a damage award against du Pont. Section 4 thus creates an incentive, analogous to a contingent fee, for the prosecution of private antitrust suits. But it authorizes an award only in a "successfully prosecuted private antitrust action." Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970).

The statute is strictly construed. The "success" demanded by every case in point is not, as is here contended (Netter Affidavit, pp. 8-21), established by a plaintiff securing favorable results in some of the skirmishes of litigation. The requisite success must be found in a money judgment for damages that results from an adversarial proceeding before the finder of fact. Assessment of an attorney's fee accordingly is not authorized even where an injunction is obtained without a money judgment, e.g., Milgram v. Loew's, Inc., 192 F.2d 579, 586-587 (3d Cir. 1951), cert. denied, 343 U.S. 929 (1952); Decorative Stone Co. v. Building

Trades Council, 23 F.2d 426, 428 (2d Cir.), cert. denied, 277 U.S. 594 (1928), or a recovery is secured through settlement, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 468-69 (2d Cir. 1974). Where recovery is secured on some, but not all of the theories advanced, "the fee awarded should not include compensation for time expended upon theories of liability or overdrawn items of damage ultimately rejected by the trier of fact." Vandervelde v. Put and Call Brokers and Dealers Assn., 344 F. Supp. 157, 160 (S.D.N.Y. 1972). The authority of the Court to assess a fee against the defendant is thus wholly contingent, as Section 4 states, on the plaintiff's success in showing that it has been "injured in his business or property by reason of" an antitrust violation. In short, Section 4 operates to reward "self-appointed fiduciaries" such as plaintiff's counsel handsomely if they prevail but not at all if they fail, as applicants have.

This rule has been strictly adhered to, for the reasons made clear in Alyeska, supra. There is not the slightest support for the theory advanced in support of plaintiffs' instant application that an equitable basis for the assessment of attorneys' fee may be found in the purported

reasonableness of their bringing a private damage action following the Supreme Court's decision that du Pont's ownership of General Motors stock violated Section 7.*/ (See Netter Affidavit at pp. 4-8.) Moreover, to accept that theory would not result, as plaintiffs' counsel contends (id., p. 25), in a sui generis award, but would establish a precedent permitting the award of attorneys' fees whenever a non-frivolous, but unsuccessful, treble damage action follows upon a government suit that adjudicated an antitrust violation.

The contingent nature of the fee provision of Section 4 is amply demonstrated by the rule that counsel who succeeds in obtaining a damage award should receive some multiple, measured by the risk of litigation, of a normal fee for the time invested. See, e.g., this Court's decision in City of Detroit v. Grinnell Corp., No. 68 Civ. 4026, Apr. 21, 1976, at p. 9. (Fee award out of settlement fund in antitrust case should include triple the fee normal for certain of the hours spent because of "mostly importantly, the risk of litigation . . .")

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*/ That such violation "was the underlying cause for the institution of this suit," urged in the Netter Affidavit (p. 24) as the reason why du Pont is obligated to pay plaintiffs' fees and expenses, is not recognized by the statute as a basis for awarding fees. It is not the institution of the suit but the result that determines entitlement to fees.

The notion that the existence of a prior Government adjudication of an antitrust violation should warrant a fee regardless of the outcome of the private action would stand on their head the principles established for awarding fees in antitrust cases. As is shown by this Court's leading exposition of the factors to be considered in making such an award, existence of a prior judgment in a Government case is not a factor that militates toward an increased fee, but is instead to be considered in determining whether the fee should be limited because the result secured by the Government reduced the risk of the private litigation. See Trans-World Airlines, Inc. v. Hughes, 312 F. Supp. 478 480 (S.D.N.Y. 1970), modified in other respects, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973); accord, City of Detroit v. Grinnell Corp., supra, 495 F.2d at 470.

Here, moreover, as is more fully detailed in General Motors' opposition, the difficulties that plaintiffs face in trying to establish injury to General Motors were apparent from the outset, in view of the Supreme Court's

initial determination

> "that considerations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best." 353 U.S. at 606.
>
> "All concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to over-reach anyone . . .." 353 U.S. at 607.

Plaintiffs' counsel instituted this litigation armed with an extensive record and judicial decisions more than adequate to alert them to a very real prospect of ultimate failure. No matter how hard and long they may have fought, nor how committed they were to their cause, there is no lawful basis for a departure from the strict standards of Section 4 of the Clayton Act.*/

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*/ Plaintiffs' extended recital of their counsel's efforts in this litigation is wholly one-sided. Both defendants through their counsel were of course equally involved in all the matters recited in the Netter Affidavit, and, in addition, bore the principal brunt of extensive discovery. Defendants have, accordingly, already expended substantial amounts in defending against what was ultimately determined to be a worthless claim that plaintiffs -- through their counsel -- nonetheless prosecuted for some 19 years.

The application for an order directing that plaintiffs' counsel fees and expenses be paid by defendants should be denied.

Respectfully submitted,

COVINGTON & BURLING

By Daniel M. Gribbon
(A Member Of The Firm)

888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Defendant
E. I. du Pont de Nemours & Company

Of Counsel:

Daniel M. Gribbon
Harris Weinstein

May 28, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER, Plaintiffs, vs. GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, Defendants.	Civil Action No. 121-251 (CMM)

OPPOSITION OF GENERAL MOTORS CORPORATION TO APPLICATION OF PLAINTIFFS' ATTORNEYS FOR PAYMENT OF COUNSEL FEES AND EXPENSES

This unprecendented application has been made by General Counsel for the plaintiffs on behalf of the various attorneys* who have appeared for, or otherwise participated on behalf of, plaintiffs in this action. They seek an order for payment by defendants of up to $1,000,000 in counsel fees and up to $345,059.94 for disbursements and expenses.

*Presumably, this includes Mr. Clendon H. Lee.

Plaintiffs have not prevailed and therefore are not entitled to counsel fees on any theory. Plaintiffs' counsel have totally failed to establish any right on behalf of General Motors Corporation (General Motors) to recover from E. I. du Pont de Nemours & Company (du Pont) either treble or single damages. Their claim for counsel fees under the antitrust laws must therefore fail. Further, their unique theory of "ventilation" is no substitute for the required benefit which they must have obtained in a derivative action in order to justify a claim for an attorneys' fee against General Motors and its stockholders.

Plaintiffs' counsel have ignored the Court's repeated requests for precedent which would support the Court's power under these circumstances either to direct or to authorize payment of fees and expenses of over twenty attorneys and supporting staffs. (Aff. p. 23).

Introduction

The affidavit in support of the motion for payment of plaintiffs' counsel fees, disbursements and expenses assumes--but does not discuss and does not offer any authority for--the

proposition that there is some "broad equitable jurisdiction" (Aff. p. 25) which could be the basis for awarding fees to plaintiffs' attorneys. Lest the Court be misled by counsel's bland attempt to begin on the far side of their highest hurdle, we are obliged to reiterate the fundamental principle that:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240, 247 (1975).

The principal rationale of the American Rule is that parties, in determining whether to prosecute or defend claims, should not be dissuaded by fear of the possibility of having to pay their opponent's counsel fees if they lose.

Plaintiffs' counsel would doubly subvert this basic principle. First, they are not even the "prevailing litigant".* Plaintiffs have finally conceded that

*Even the Court of Appeals, whose award of fees was reversed in Alyeska, held that a party who did not prevail (Cordova) could not claim fees. 495 F.2d at 1028. See also N.Y. Bus. Corp. Law §626(e) (McKinney 1963) which provides that attorneys' fees may be awarded if the derivative action is successful or produces a settlement.

> "... it would not be in the best interests of the General Motors stockholders to continue with the suits for upon the facts and law there appeared to be little likelihood of recovery upon the remaining claims and the continuation of the litigation would only entail needless expense to both defendants and plaintiffs." (Aff. p. 22).

Second, plaintiff's attorneys then argue that they should get counsel fees and expenses because this has been "an unusual and challenging case spanning some nineteen years." (Aff. p. 25). Under plaintiffs' counsels' view, they should get attorney fees simply because the claim for fees is large--in other words, the significance of the departure from the general rule is supposed to be reason enough for disregarding it.

The Supreme Court said in Alyeska, however, that there is no "roving authority . . . to allow counsel fees as costs or otherwise . . ."* 421 U.S. at 260. There must be clear statutory authority or, in those limited exceptions recognized in derivative actions, there must be a showing of a substantial benefit. As we will show, plaintiffs' counsel here qualifies on neither basis.

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*Such lack of reciprocal justice is certainly not present in the English rule which allows counsel fees to the prevailing party. Implicit even in Justice Marshall's dissent in Alyeska is the premise that the "successful" party is the one who receives attorneys fees under the three criteria set forth by him. See 421 U.S. at 274, 275, 276, 283. Further, for obvious reasons, plaintiffs' counsel in this case have not satisfied any of the three criteria set forth by Justice Marshall. See 421 U.S. at 284-85.

I. COUNSEL FEES MAY NOT BE AWARDED BECAUSE THERE HAS BEEN NO RECOVERY OF DAMAGES UNDER THE ANTITRUST LAWS

As stated in Alyeska, there can be statutory exceptions to the American Rule. Section 4 of the Clayton Act is one example. But, it is only necessary to say that, inasmuch as plaintiffs failed to obtain a judgment for damages, they have not brought themselves within the boundaries of the statutory power to award monetary relief, including attorneys fees, as delineated within Section 4. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis supplied.)

This statute thus explicitly allows an attorney's fee to be assessed but only as part of a judgment for treble damages. Such a judgment, in turn, may be entered only when the plaintiff proves both a violation of a pertinent antitrust statute by defendant and resulting injury to plaintiff's "business or property." Here there was no judgment for treble damages because of a complete failure of proof that General Motors was injured by du Pont's ownership of stock.*

This Court decided over twenty years ago that such a failure of proof also precludes an award of attorney's fees under Section 4. Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers, 80 F.Supp. 888 (S.D.N.Y. 1948), directly holds that because "plaintiffs have not proved anything from which the court could approximate the damages" and were thus "not entitled to a money judgment," attorneys' fees could not be awarded. Id. at 899. This principle has been

*The Supreme Court in Alyeska pointed out that "Under the antitrust laws, for instance, allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory." (Emphasis supplied.) (421 U.S. at 261)

followed by the federal courts generally, see, e.g., Talon v. Union Slide Fastener, Inc., 266 F.2d 731 (9th Cir. 1959); Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649 (3d Cir. 1967); Merola v. The Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974); De Filippo v. Ford Motor Company, 516 F.2d 1313 (3d Cir. 1975); NBO Industries Treadway Companies, Inc. v. Brunswick Corporation, 523 F.2d 262 (3d Cir. 1975).

Plaintiffs point to the 1969 Court of Appeals decision herein that a Section 7 violation can serve as a basis for a Section 4 treble damage action. Although a decision was rendered in this case that plaintiffs were entitled to sue du Pont for treble damages under Section 7 of the Clayton Act, mere establishment of a legal principle does not justify the award of attorney fees.

The Delaware Supreme Court, for example, has held that plaintiffs' actions in causing an exposition of the law relating to stock options and entrenching the corporation's position with regard to its own stock option plan was not

the benefit needed to justify an award of counsel fees when "every single feature of its option plan as originally proposed was eventually sustained." Gottlieb v. Heyden Chemical Corp., 34 Del. Ch. 436, 105 A2d 461, 462 (1954). The court noted that clarification of the law is the aim of every judicial opinion on a legal question and while that result may indeed prove helpful to future practioners, no principle of equity required that defendant corporation pay the expenses of both parties "in the achievement of this species of public service."*

II. COUNSEL FEES MAY NOT BE AWARDED BECAUSE THERE HAS BEEN NO SUBSTANTIAL BENEFIT TO GENERAL MOTORS WHICH SATISFIES THE LIMITED EXCEPTION PROVIDED IN DERIVATIVE ACTIONS

A limited, second exception to the American Rule

*Judge Weinfeld has held that even though plaintiffs establish a legal principle (in respect of Section 16(b) of the Securities Exchange Act of 1934), their attorneys are not entitled to fees where there is no recovery and no particular benefit to the stockholders. (Lewis v. Arcara, 8/8/75, S.D.N.Y., 74 Civ. 4627).

exists when a plaintiff confers a tangible benefit,* as in a derivative claim, but there must be some "pecuniary benefit" involving "tangible financial gains" or some "substantial benefit to the corporation." 7A Wright and Miller, Federal Practice and Procedure, § 1841; Fletcher, Cyclopedia, Private Corporation, § 6045, at p. 561 (1970). In Schectman v. Wolson, 244 F.2d 537 (2d Cir. 1957), the court found no tangible benefit in a derivative suit which forced the resignation of directors of competing corporations under Section 8 of the Clayton Act.

The benefit must be tangible. In Gildener v. Lynch, 184 Misc. 427, 54 N.Y.S. 2d 827 (1945), for example, plaintiff's suit resulted in assignment to the corporation of a lease which had been secretly procured by two of the directors. A cancellation of illegally issued stock and termination of an associated contract was a substantial benefit created by the successful plaintiff in Mencher v. Sachs, 39 Del. Ch. 266, 164 A.2d 320 (1960).

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* In Alyeska, the Court described this exception as "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the otherparties enjoying the benefit." (421 U.S. at 257. (Emphasis supplied.) Here there is no fund and there are no parties enjoying a benefit.

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The "ventilation" theory of benefit offered by plaintiffs' counsel, however, is legally, logically and factually deficient. It is legally deficient because an unsuccessful derivative action does not confer a benefit upon the corporation by prompting an exposition or ventilation of the facts and clarification of the legal principles involved in the litigation.

In Perrine v. Pennroad Corporation, 29 Del. Ch. 423, 51 A.2d 327 (1947) (Seitz, Vice-Chancellor),* aff'd 30 Del. Ch. 517, 64 A.2d 412 (1948), stockholders who unsuccessfully opposed settlement of a derivative action were denied attorney fees. In rejecting plaintiffs' ventilation theory, the Court stated:

*Vice-Chancellor Seitz wrote the opinion in Saks v. Gamble, 154 A.2d 767 (Del. Ch. 1958). Saks is not applicable because plaintiffs have only proved General Motors correct and have not produced a benefit, such as the disclosure of hidden stock ownership by the corporation in Saks.

"Petitioners failed when the touchstone was success. Petitioners say in effect that their services in unsuccessfully opposing the settlement constituted a negative catalyst which prevented fraud and assured the court that all facets of the settlement would be presented.

* * *

Doubtless the petitioners aided the court in arriving at its conclusion, but that may be said of most attorneys representing losing causes. If refusal of compensation here can be said to discourage the proper policing of corporate affairs it must also be recognized that the rule which authorizes compensation only in the event of success strikes a balance between opposing interests." (51 A.2d at 334-335)

Within this District and with reference to counsel whose "efforts and abilities were of the highest caliber" (p. 9) and "notwithstanding the hundreds of hours expended by plaintiffs' counsel in litigating this case" (p. 4), Judge Conner denied plaintiffs' fee application because of " ... the inappropriateness of awarding attorney's fees in the absence of ... a benefit to the class represented by the applicant." Korn v. Franchard Corporation, et al., 67 Civ. 3445, p. 9 (S.D.N.Y. 1975). In language that is especially pertinent to plaintiffs herein, the Court added:

> "Plaintiffs counsel who accept cases on a contingency basis are well aware of the risk and burdens inherent in prosecuting such suits. They realize that . . . if they fail to obtain any benefit for their client, their services will go uncompensated." (pp. 9-10)

To the same effect, Judge Pollack in Academic Computer Systems v. Yarmuth, et al., 73 Civ. 3930 (S.D.N.Y. 1976), pointed out that the burden of proof of a substantial benefit is upon the plaintiff who seeks to recover attorneys' fees and held:

> "The litigation was not successful and 'the mere institution of a stockholder's action does not guarantee that the plaintiff will be awarded attorney's fees . . .'" (pp. 10-11)

Second, the argument that the mere resolution of a legal dispute constitutes a benefit sufficient to justify the award of an attorney's fee leads to a logical absurdity. In effect, counsel are saying that they did General Motors a favor by affording it the opportunity to demonstrate at great expense, that the original management decision not to sue du Pont was right all along. This rationale would justify the award of attorneys fees against the victor in any lawsuit because his position has been vindicated before the world.

Finally, the benefit theory is factually lacking. It is predicated upon the thesis that "The opinions of the Supreme Court upon both appeals (of the government case) clearly pointed to the need for . . . an independent judicial determination . . . (as to) whether General Motors had in fact been damaged as a result of the unlawful actions of du Pont over the many years" (Aff. p. 4); U.S. v. du Pont, 353 U.S. 586 (1957); 366 U.S. 316 (1961).

Plaintiffs' counsel disregard the comprehensive investigations made by the management and counsel, including outside counsel, of General Motors following the filing of the Government case in 1948. Similarly it disregards the years of investigation and discovery which took place during the Government suit, the Grand Jury investigation, the wide search throughout the files of du Pont, General Motors and other companies, the many depositions and the evidence presented in the seven months of trial before the court in Chicago. To say that no "thorough and independent investigation" was conducted is merely to say that only self-appointed counsel, who have located a stockholder to lend his name as

nominal plaintiff, are fit to investigate and appraise whether the Corporation has been damaged.

The question of whether the General Motors management at all times acted "in the best interests of General Motors" was uppermost in both the investigation and the trial in the District Court in Chicago. The District Court held squarely against the government:

> "The evidence, both oral and documentary, does not establish, however, that there was any agreement between the two companies that required General Motors to buy all or any part of its requirements from du Pont. Nor does the evidence establish that du Pont dictated or controlled the purchasing policies and practices of General Motors or sought to dictate or control those policies and practices. In fact, the evidence shows that General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that du Pont manufactured." (U.S. v. du Pont, 126 F.Supp. 235, 276 (N.D. Ill. 1954)).

The District Court found that there was no restraint of trade or monopoly and that General Motors, as well as du Pont, had in no way violated Sections 1 and 2 of the Sherman Act.

The Supreme Court opinion expressly left this finding undisturbed. That Court's finding of violation of Section 7 was based on a determination that the stockholding created the likelihood in the future of possible restraints:

> "... the test of a violation of §7 [of the Clayton Act] is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." (353 U.S. at 607)

The Supreme Court quarreled, not with the District Court's finding of "30 years of nonrestraint", but with its conclusion that this history "'negatived any reasonable probability of such restraint' at the time of suit".

General Motors spent a great deal of time and money in defending the Government case. Because of these plaintiffs, General Motors (and its stockholders) has had to spend still more time and money and has again established that it bought free of restraint and thus was not damaged. The plaintiffs' efforts foundered not because of General Motors' "hard adversary position", about which they complain, but simply because facts do not change.

The award of counsel fees in this case would contradict and offend the strong public policy against rewarding those who bring meritless lawsuits. Counsel would have every motivation to press flimsy claims if they knew that--win, lose or draw--they would be compensated for their efforts by the targets of their attacks.

CONCLUSION

Plaintiffs have not been successful in this litigation; therefore, they do not qualify as the prevailing party to whom counsel fees could be awarded. Under the Clayton Act, plaintiffs' counsel can make no showing that they qualify under Section 4. There has been no award of treble damages; therefore, there may be no award of counsel fees.

Even under the limited exception to the American Rule which exists when a substantial benefit is conferred by the successful efforts of plaintiffs, as in a derivative claim, plaintiffs and their counsel have produced nothing, whether monetary or otherwise, of benefit to General Motors and their

fellow General Motors stockholders. Far from conferring any benefit -- substantial or otherwise -- on General Motors, this suit has been a source of considerable expense to General Motors in reestablishing the already well-established. In such circumstances an award of counsel fees to plaintiffs' attorneys would be wholly contrary to well considered and established rules and the application accordingly should be denied.

Respectfully submitted,

William P. Gray

Edward B. Worrall, Jr.

Attorneys for Defendant General Motors Corporation

Of Counsel:

Frazer F. Hilder
Calvert Thomas
John J. Higgins

Dated: New York, New York
May 28, 1976

104a

HENRY L BAYLES
ATTORNEY AT LAW
55 LIBERTY STREET
NEW YORK, N Y. 10005
WORTH 4 0285

June 14, 1976

Hon. Charles M. Metzner
United States District Judge
Federal Court House
Foley Square
New York, N. Y. 10007

Re: Gottesman v. General Motors & duPont

Dear Judge Metzner:

I am in receipt of a copy of the papers submitted by defendants in opposition to plaintiffs' application for counsel fees and expenses.

I respectfully request that plaintiffs be permitted to serve their reply papers after the conference which your Honor indicated would be held in this matter.

Respectfully yours,

HLB/rt

Henry L. Bayles

cc: Daniel M. Gribbon, Esq.
c/o Covington & Burling
888 Sixteenth St., N. W.
Washington, D. C. 20006

William A. Grier, Esq.
767 Fifth Avenue
New York, N. Y. 10022

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

CHAMBERS OF
CHARLES M. METZNER
DISTRICT JUDGE

September 20, 1976

Henry L. Bayles, Esq.
55 Liberty Street
New York, N. Y. 10005

Gottesman, et al. v. General Motors Corporation and E. I. duPont et al. No. 121-251

Dear Mr. Bayles:

In your letter of June 14, you indicated that you wished permission to serve reply papers on your fee application after a conference to be held in this matter.

I don't recall ever indicating that I would hold another conference in this matter. I have conferred on several occasions with all counsel and on at least two occasions with you alone with the permission of other counsel. I see no reason for any further oral discussion.

Will you please file any reply papers that you have no later than October 20, 1976. I think that everything that could possibly be said in this area has already been said.

Very truly yours,

Charles M. Metzner

cc: William A. Grier, Esq.
Daniel M. Gribbon, Esq.

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HBN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CALLMAN GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. duPONT de NEMOURS & COMPANY,

Defendants.

REPLY AFFIDAVIT

Civil Action No. 121 - 251

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD NETTER, being duly sworn, deposes and says that he is Senior Partner of Netter, Dowd, Ness, Alfieri & Stern, General Counsel for the plaintiffs.

Deponent has read the papers submitted by General Motors and duPont in opposition to plaintiffs' application for payment of their counsel fees and reimbursement of expenses, and respectfully submits this affidavit and the annexed affidavit of Leo Brady in reply thereto.

Before considering the respective positions taken by each defendant, we may point out certain matters which have not been disputed by either defendant.

1. It is not disputed that this suit was instituted and continued in good faith and that plaintiffs had a reasonable basis for doing so as a result of the decisions of the Supreme Court and the Court of Appeals for the Second Circuit.

2. The institution and continuance of this suit had the judicial approval of the Court of Appeals for the Second Circuit.

3. From the very beginning, each of the defendants tried to prevent having any judicial determination at all made as to whether General Motors had been damaged as a result of actions of duPont which the Supreme Court held violated the antitrust laws; but plaintiffs' right to institute and continue such a suit on behalf of General Motors was sustained.

4. From the very beginning, each of the defendants tried to prevent plaintiffs from asserting any claim for damages against duPont predicated upon the Supreme Court decisions, claiming that duPont's violation of the Clayton Act did not give rise to any cause of action for damages in favor of General Motors; but plaintiffs' right to assert such a cause of action on behalf of General Motors was sustained.

5. From the very beginning, both defendants attempted in various ways to minimize any recovery which might ultimately be granted in this suit in favor of General Motors, including the following: (1) by opposing the joinder of other stockholders whose ownership of stock predated that of the remaining plaintiffs in this consolidated action; and (2) by urging that the statute of limitations served to limit recovery.

6. Defendants do not dispute the rendition of the various services by plaintiffs' counsel as set forth in the moving papers and that these services were ably and conscientiously performed over an extended period of years by counsel, some of whom are now deceased -- Edward R. Rothenberg, Abbott Gould, Jesse R. Bacharach, Robert Netter, and since the making of this application, David Brady.

7. Defendants -- at least upon the present application -- do not question the reasonableness of the sum of one million dollars for the extensive services rendered by the many attorneys or that plaintiffs incurred expenses of $345,059.94 -- but take the position that neither of defendants should be required to make payment.

8. Defendants further do not dispute that subsequent to the final dismissal of the claims in Gottesman pertaining to automotive fabrics and finishes, in an effort to dispose of the various remaining claims in Gottesman and Schiff, plaintiffs' counsel in both cases by agreement with duPont and General Motors, undertook to make a complete independent investigation of the facts and in this phase of their services received the cooperation of both defendants, who supplied data to plaintiffs; and thereafter General Counsel in Gottesman and Schiff rendered their reports to the Court recommending that it would be in the best interests of the stockholders of General Motors that these remaining claims not be continued.

9. Defendants further do not dispute that in connection with the Notice to stockholders of General Motors with respect to the proposed dismissal of all claims in Gottesman and Schiff, the stockholders were also advised of the proposed application by plaintiffs for payment of their counsel fees for all of the various services rendered in the sum of $1,000,000 and expenses of $345,059.94. So far as deponent knows, no stockholder filed with the Court any opposition to that part of the application.

Position of General Motors

In seeking to vindicate its claim that it was not chargeable with overreaching and to sustain its burden of showing the fairness of its sales to General Motors, duPont was trying to avoid a judgment against it in favor of General Motors which could have run into staggering sums.

But the position taken by General Motors seeking to defeat any recovery in its favor, deponent submits, is not defensible insofar as the rights of its stockholders are concerned. With respect to the claim of automotive fabrics and finishes -- the only items passed upon by the Supreme Court or tried before this Court -- General Motors was not the target of any charge; on the contrary, if plaintiffs had prevailed, General Motors would have been the beneficiary of any recovery.

But General Motors in connection with the determination of the issue whether it was entitled to damages against duPont, did not adopt an attitude of "Let the Court decide whether we are entitled to recover and in connection with such a determination, we will supply the plaintiffs (acting for us) with all information and data which would in any way be relevant upon our right to recover." General Motors did not adopt such a position even after the Court of Appeals ruled (268 F.2d 194, 197) that this derivative action by plaintiffs as fiduciaries was bound to follow the Supreme Court decision and should not be "stopped" and that the violation of the antitrust laws by duPont "can in no way be ratified or rectified by a vote of the stockholders of General Motors."

Instead, as we have indicated, from the very beginning General Motors joined in an attempt to prevent any judicial determination and when this failed, then attempted to limit any recovery which it itself would be entitled to obtain.

At no time after the decisions by the Supreme Court has General Motors indicated that outside independent attorneys had been requested by it to investigate the question as to whether General Motors had sustained any damages as a result of duPont's unlawful actions. At no time prior to or subsequent to the Supreme Court decisions did General Motors make available to the plaintiffs the data and results of any investigation conducted by independent or even their own counsel relevant to the question of whether General Motors had or had not been damaged.

It would seem that if any such investigation had been made by independent or their own counsel, it was the clear duty of General Motors to advise the plaintiffs of the data and results of such investigation which would have considerably facilitated the judicial determination and shortened the pretrial proceedings and trial. Instead, General Motors adopted a hard adversary position, challenging plaintiffs at every step.

Once the Court of Appeals determined that plaintiffs had the right to sue on behalf of General Motors, it is submitted that General Motors should have cooperated with plaintiffs in connection with the trial of the issue pertaining to finishes and fabrics, as it subsequently did after the trial in connection with plaintiffs' report to the Court as to the advisability of continuing with the prosecution of the additional claims in Gottesman and Schiff which had not been determined by the Gottesman trial.

If outside independent counsel had been requested by General Motors after the Supreme Court decisions to conduct a thorough objective investigation as to what damages, if any, General Motors had sustained as a result of the unlawful antitrust actions of duPont, the expense of such investigation would have been, of course, a proper charge against General Motors.

The expenses sustained by plaintiffs in their investigation with respect to automotive fabrics and finishes, under the facts of this case, it is submitted, should likewise properly be paid by General Motors.

In addition, plaintiffs rendered other special services which benefited the stockholders of General Motors:

(1) Plaintiffs established the right of the stockholders to sue and obtain an adjudication as to whether General Motors had in fact been damaged;

(2) Plaintiffs established that the stockholders were not precluded from attempting to obtain recovery for General Motors by any position taken by General Motors in the Government suit;

(3) Plaintiffs established that duPont's action in violating the Clayton antitrust law did give rise to a cause of action for damages in favor of General Motors. This determination was a significant benefit to the stockholders of General Motors but also to stockholders in general and clearly vindicated the policy underlying the antitrust law irrespective of any relief which might finally be granted.

At this point plaintiffs would properly have been entitled to apply for and obtain an interim award and reimbursement of expenses.

As stated in Mills v. Electric Auto-Lite Co., 396 U. S. 375, 396:

> "Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all stockholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit."

(4) Plaintiffs further benefited General Motors subsequent to the trial by reviewing at the request of General Motors and duPont, all of the facts and circumstances including data supplied by duPont and General Motors and reporting to the Court whether it would be in the best interests of the stockholders of General Motors to continue with the further prosecution of the Gottesman and Schiff cases.

Deponent respectfully submits that with respect to each of the items of services set forth in our moving affidavit (see pp. 9 et seq.), plaintiffs performed valuable services which benefited the stockholders of General Motors and that this Court under its broad equitable powers should grant plaintiffs' application for payment by General Motors.

Responsibility of duPont

It is clear that duPont also should be required to share with General Motors plaintiffs' expenses of this litigation.

It was duPont's adjudicated violation of the antitrust laws that caused this litigation and after plaintiffs sustained their right to institute and continue the action, it then became

duPont's duty and burden to establish that its dealings with General Motors were fair (cf. 436 F.2d 1205, 1212; 279 F.Supp. 361, 384). DuPont accordingly, together with General Motors, should be chargeable with payment of plaintiffs' counsel fees and expenses.

Relief Requested

Deponent respectfully submits that this Court has ample power to grant the application and should in the exercise of its discretion do so. In exercising its discretion the Court, of course, considers the facts and equities of each individual case. The instant case is unique and sui generis and it is requested that the Court's discretion be molded to fit the equities presented. It is submitted that the Court's determination here should not be controlled by any particular precedent and by the same token, the Court's determination does not establish a precedent controlling other cases.

Adequate compensation for the services performed by plaintiffs' General Counsel and the large number of attorneys associated with them would involve an enormous sum of money.

In connection with the dismissal of the remaining claims in Gottesman and Schiff and the Notice to Stockholders, plaintiffs agreed with counsel to General Motors and duPont to limit the amount of the maximum fee to that requested herein; and deponent wishes to make it clear that neither General Motors nor duPont agreed to make any payment. When we consider the fact that for almost twenty years a number of experienced attorneys rendered extensive services, the requested fee of $1,000,000 for all services is modest.

With respect to reimbursement of plaintiffs for their substantial expenses, neither duPont nor General Motors upon this

application has objected to the amount. These expenses have been necessarily incurred in the very best of faith and for the benefit of the stockholders of General Motors in order to prosecute the action; and reimbursement would do no more than recompense plaintiffs for their expenses. The denial of such reimbursement would certainly constitute an inequitable result.

In the face of the decisions of the Supreme Court and of the Circuit Court of Appeals, it could hardly be asserted that the action was not instituted and prosecuted in the very best of faith. No one -- but no one -- could predict the outcome of the litigation. It required judicial determination by this Court which only took place after the prosecution of a highly complicated, difficult and costly suit. To deny recovery to plaintiffs for their counsel fees and expenses because no money judgment had been obtained against duPont, it is submitted, would be a most inequitable result.

As we have stated in our moving papers, counsel for both Gottesman as well as Schiff stand ready to appear before the Court in connection with any hearing which may be ordered upon this application or in connection with any conference which the Court believes might be helpful in disposing of the application.

Richard Netter

Sworn to before me this
23rd day of November, 1976.

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

RITA GOTTESMAN, MARIA MATTIELLO and PAUL J. PEYSER,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. duPONT de NEMOURS & COMPANY,

Defendants

CIVIL ACTION #121 - 251

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEO BRADY being duly sworn, deposes and says:

Throughout most of the years of this litigation I have been associated as General Counsel with the late David Brady in the Schiff case and we were likewise associated with other counsel in the Gottesman case.

I have read the affidavit of Richard Netter sworn to April 21, 1976 and the opposing papers of counsel for both defendants, dated May 28, 1976 as well as the Reply Affidavit of Richard Netter herewith submitted.

I am familiar with all the proceedings in the litigation, and I subscribe to and support the position set forth in the moving and reply affidavit of Richard Netter. I also join in the application for allowances and respectfully request that the same be granted.

Leo Brady

Sworn to before me this
23rd day of November, 1976

Notary Public

Notary Public, State of New York
No. 24-6010
Qualified in Kings County
Term Expires March 30, 1978

116a

GENERAL MOTORS CORPORATION
General Motors Building · 767 Fifth Avenue, New York, New York 10022

Telephone
(212) 486-5000

December 13, 1976

Honorable Charles M. Metzner
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Gottesman et al. v. General Motors
and du Pont - Civil Action No. 121-251

Dear Judge Metzner:

We have noted the affidavits of Richard Netter, Esq., and Leo Brady, Esq., each dated November 23, 1976. The exchange of papers has to stop sometime and, accordingly, we do not burden the court with a point-by-point rejoinder.

We merely observe that plaintiffs' counsel seem to base their plea on the repeated claims that they acted "in good faith" and that General Motors opposed their efforts. The claim of good faith is hardly a reason for awarding a fee. The latter claim once more demonstrates counsel's total disregard of the comprehensive inquiries made by GM management, by inside counsel and by outside counsel during the years of government litigation, culminating in the District Court's finding in the Government case (which the Supreme Court left undisturbed) that "General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that du Pont manufactured." U.S. v. du Pont, 126 F. Supp. 235, 276 (N.D. Ill. 1954).

In short, plaintiffs' counsel once again seek to assert the superiority of their judgment to that of the many counsel who have represented General Motors in the course of these litigations over more than a quarter-century. It turned out that, after putting General Motors to a useless massive

expenditure of resources, they were wrong. General Motors' stockholders gained nothing by this fruitless undertaking and it would be contrary to established law and inequitable to require the stockholders to bear the expenses of presenting both sides.

Respectfully submitted,

William A. Spencer

Edward B. Wallace (per WAS)

Attorneys for Defendant General Motors Corporation

Of Counsel:

Frazer F. Hilder
Calvert Thomas
John J. Higgins

cc: Henry L. Bayles, Esq.
55 Liberty Street
New York, New York 10005

Richard Netter, Esq.
Netter Dowd Ness Alfieri & Stern
660 Madison Avenue
New York, New York 10021

Daniel M. Gribbon, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

7 45 782

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CALLMAN GOTTESMAN and PAUL J. PEYSER, :

Plaintiffs, :

-against- : Civil Action No. 121-251 (CMM)

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY, :

Defendants. :

- x

A P P E A R A N C E S

Netter Dowd Ness Alfieri & Stern
660 Madison Avenue
New York, N. Y.

Richard M. Netter, Of Counsel

Henry L. Bayles
55 Liberty Street
New York, N. Y.

Of Counsel

Attorneys for Plaintiffs

William A. Grier
Edward B. Wallace
Attorneys for Defendant General Motors Corporation
767 Fifth Avenue
New York, N. Y.

Frazer F. Hilder
Calvert Thomas
John J. Higgins

Of Counsel

Covington & Burling
Attorneys for Defendant E. I. duPont de Nemours & Company
888 Sixteenth St., N.W.
Washington, D.C. 20006

(202)-
452-6000

Daniel M. Gribbon
Harris Weinstein

Of Counsel

METZNER, D. J.:

Counsel for plaintiffs in this unsuccessful derivative stockholders' action seek an award of $1,000,000 as counsel fees and $345,059.94 for disbursements and expenses. The claim is directed against both General Motors Corporation (General Motors) on whose behalf the antitrust suit was prosecuted, and E. I. duPont de Nemours & Company (duPont), the prime defendant.

The court has received neither a proper affidavit of services nor an itemization of the amount requested as disbursements. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974). While the court has extensive knowledge of the litigation, this knowledge only goes to the nature and extent of the legal services rendered, not to the amount and propriety of the claimed disbursements. However, this omission does not affect the determination of the application, which must be denied.

On October 1, 1959, the day following my induction as a judge of this court, I acceded to the request of the then Chief Judge Sylvester J. Ryan to become the Rule 2 judge[1] in what he described as a

1. Rule 2 of the rules of this court, under the master calendar system which was in operation at the time, provided that a complicated case requiring prolonged attention of the court could be assigned for all purposes by the Chief Judge to one of the judges of the court.

"fascinating case."[2] Now, nearly eighteen years later, it appears that the end has been reached with the making of this application at the foot of the judgment of dismissal that was entered on January 23, 1976.

The litigation was bitterly fought, as can be seen by the published reports.[3] However, all came to naught when the final judgment after trial dismissing two of plaintiffs' claims was affirmed on appeal, and certiorari was denied.

No tangible benefit has been conferred on General Motors by the institution of this action. No fund exists as the result of counsel's activity to which a fee can attach. Despite this, the court is urged to allow the fee because "Gottesman has indeed been an unusual and challenging case spanning some nineteen years. . . . In view of the particular and unique aspects of this case--which may

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2. The Chief Judge was correct in so labelling the case, but I never dreamed that his characterization would include the span of active service of a judge, the death of four of the twenty counsel involved on plaintiff's side, the passage of the tenure of five successive general counsels of General Motors, and the elevation to chief executive officer of duPont of one of its counsel.

3. 171 F. Supp. 661, 268 F.2d 194; 28 F.R.D. 325; 7 Fed. Rules Serv. 2d 24a.2, Case 2; 221 F. Supp. 488, cert. denied, 379 U.S. 940, rehearing denied, 382 U.S. 875; 222 F. Supp. 342, cert. denied, 379 U.S. 882; 331 F.2d 963, cert. denied, 379 U.S. 851; 279 F. Supp. 361, 401 F.2d 510, 414 F.2d 956; 310 F. Supp. 1257, 436 F.2d 1205, cert. denied, 403 U.S. 911, rehearing denied, 404 U.S. 876.

fairly be considered sui generis--we respectfully request that the Court should exercise the broad equitable jurisdiction vested in it and grant plaintiff's application." There is no doubt that the case presented unusual and challenging aspects. There certainly was professional satisfaction for the court and I am sure for the lawyers involved in the litigation. However, the defendants cannot be called upon to pay for such satisfaction.

Applicants urge that the action was instituted in good faith, that it had to be instituted after the government obtained divestiture by duPont of General Motors' stock, that the institution and continuance of the action received judicial approval, that the services rendered benefited General Motors stockholders, stockholders in general, and the general public, and also served a therapeutic corporate purpose.

There is no doubt that the action was started in good faith. In fact, as the Court of Appeals pointed out, the institution of such an action was a foregone conclusion after entry of the government judgment. 268 F.2d 194, 198.

The statement that the court approved the institution and continuance of the action is not quite accurate. Motions to dismiss were denied, and the right of plaintiffs to maintain the action was sustained.

Such rulings are not to be interpreted as affirmative approval of the continuance of the lawsuit in the context urged by petitioners.

It is not clear as to what is meant by the contention that each of the various categories of services benefited General Motors' stockholders, stockholders generally, or the general public. I gather that counsel is taking the position that it was necessary to "air" the relationship between General Motors and duPont. Frankly, such an "airing" was made by the government in the divestiture suit years before.

Complaint is made that General Motors joined up with duPont to resist plaintiffs' claim. The result of the litigation shows that they properly resisted plaintiffs' claim. If the plaintiffs had been successful in proving that wrongdoing existed, the recovery could well have been astronomical, overshadowing any recovery ever received in any litigation in the history of this country. This could well have justified the expenditure of $345,059.94 for disbursements. However, the finding by this court dismissing the claims after trial was to the effect that duPont's stock control of General Motors did not, in fact, result in injury to General Motors.

Lastly, it is claimed that this action by the plaintiffs served a therapeutic corporate purpose. I know

of no change of activity or conduct that was brought about as the result of the institution and prosecution of this lawsuit. If it is the contention that counsel fees are appropriate simply because initially there may have been some justification for bringing the lawsuit, it presents a novel basis for recovery. Where, for example, is the line to be drawn in weighing the propriety of initiating litigation, assuming the existence of good faith, before the court should allow fees for the unsuccessful class representative? A policy of payment based only upon a showing of tangible benefit, not merely an airing of the activity, is the only proper one to be followed.

The trial of this lawsuit was initially limited to automotive fabrics and finishes, with other product lines such as Freon 12 and tetraethyl lead to be left for another day. It was assumed that since automotive fabrics and finishes were the subject matter of the government trial and judgment, the case could be most easily proven, if at all, as to these products. The trial ended in a judgment for defendants. The plaintiffs have stipulated that it would not be in the best interests of General Motors' stockholders to continue either the open claims in this case, or the entire Schiff case.

The latter case, held in abeyance pending the determination in Gottesman, had been instituted in 1963 in an attempt to overcome a finding in Gottesman that the statute of limitations barred the claims in that case from going back beyond May 1959.

There has been some reliance placed on the language in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389 (1970). It must be borne in mind that the issue there was whether a fee should be allowed plaintiffs' counsel for establishing a violation of the securities law. A benefit had been conferred by the services even though the exact relief had not been determined. Similarly, in Kopet v. Esquire Realty Company, 523 F.2d 1005 (2d Cir. 1975), the court found that the "assessment of such fees to a group of beneficiaries may be predicated on the conferral of benefits which are neither monetary in nature nor explicitly sought on behalf of the entire group." It was found that the corporation benefited from plaintiff's action "both in arresting an existing violation of the law and in the deterrent effect which it may be assumed the action will have on the future conduct of Esquire management." In both of these cases, which employ broad language concerning the right of counsel to compensation from the corporation, there existed an ascertainable benefit to the corporation resulting from

plaintiffs' efforts. The only issue in this litigation was whether General Motors had been injured by duPont's actions in the past. The ability to inflict such injury in the future was precluded by the judgment in the government's suit calling for divestiture of duPont's holdings in General Motors.

Finally, there exists neither statutory authority nor any exception to the "American rule" that the prevailing party may not recover attorneys' fees as costs or otherwise. Actually, the basis for the requested compensation in this case is similar to that urged in Alyeska Pipe Line Co. v. Wilderness Society, 421 U.S. 240 (1975). The decision in Alyeska completely forecloses any recovery here. The instant action was an antitrust case in which plaintiffs were cast in the role of the private attorney general. There is no doubt that this role is relied on heavily as a matter of policy in the enforcement of the antitrust laws. However, statutory recovery is governed by Section 4 of the Clayton Act which conditions the allowance on the entry of a judgment in favor of the plaintiff for treble damages. Also, there has not been a common benefit achieved here to justify an allowance under the exception to the general "American rule."

Motion denied.

So ordered.

Dated: New York, N. Y.
April 12, 1977

C. C. Carlais Metzner
U. S. D. J.

ABIV

Filed 5/5/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs,

- against -

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY,

Defendants.

Civil Action No. 121-251 (CMM)

NOTICE OF APPEAL

Notice is hereby given that Callman Gottesman and Paul J. Peyser, the Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from each and every part of an order of Hon. Charles M. Metzner, U.S. District Judge, denying the application by attorneys for plaintiffs for an award of counsel fees, disbursements and expenses, entered in this action on the 13th day of April, 1977.

Said application was made pursuant to a final judgment of dismissal of this action signed by Judge Charles M. Metzner on January 23, 1976 and entered on January 27, 1976, wherein the court granted plaintiffs the right to apply at the foot of said judgment for an award of counsel fees, disbursements and expenses, and to the extent that the aforesaid application was denied, plaintiffs further appeal to the United States Court of Appeals for the Second Circuit from that portion of said judgment.

Dated: New York, New York
May 5, 1977

NETTER DOWD NESS ALFIERI & STERN

By RICHARD NETTER
A Member of the Firm
General Counsel for Plaintiffs
660 Madison Avenue
New York, New York 10021

TO: William A. Grier, Esq.
Edward B. Wallace, Esq.
Attorneys for Defendant General Motors Corporation
767 Fifth Avenue
New York, New York 10022

Covington and Burling
Attorneys for Defendant E.I. duPont DeNemours
& Company
888 Sixteenth Street, N.W.
Washington, D.C. 20006

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

CALLMAN GOTTESMAN & PAUL J. PEYSER,

Plaintiffs-Appellants,

- *against* -

GENERAL MOTORS CORPORATION &
E.I. DU PONT DE NEMOURS & COMPANY,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 17th *day of* October, *19* 77 *at* 767 Fifth Avenue New York, N.Y.

deponent served the annexed Appendix Brief *upon* John Higgins, Esq (Higgins: accepting service of 6 each for General Motors & Dupont-appellees)

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 17th *day of* October, *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979